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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1640

STANDARD EDUCATORS, INC.,

and

JAMES A. MELLEY, SR.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Standard Educators, Inc. and James A. Melley, Sr. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming an Order and Opinion of the Federal Trade Commission entered on December 6, 1971.

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 475 F. 2d. 401, and is also reproduced as Appendix A (*infra* pp. 1a – 15a). The amended judgment of the court of appeals is not officially reported; it is reproduced as Appendix B (*infra* pp. 17a – 18a). The final order and opinion of the

Federal Trade Commission are not yet officially reported; they are reproduced as Appendices C and D (*infra* pp. 19a – 60a).

JURISDICTION

The judgment and opinion of the court of appeals which affirmed the order of the Federal Trade Commission was entered on March 9, 1973. Upon a Motion To Correct Judgment filed by the Federal Trade Commission, the court of appeals issued an Amended Judgment affirming and enforcing the Federal Trade Commission's Order on April 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the chief executive and majority stockholder of a closely held corporation accused of violating the Federal Trade Commission Act have the burden of proof to show that he neither participated in nor authorized the illegal practices in order to escape liability in his individual capacity?

2. May an administrative agency accused of an unconstitutional search and seizure of evidence from Petitioners withhold documents in the agency's files relating to the seizure when Petitioners raised the search and seizure issue before trial and made timely demand for the pertinent documents?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 5 of the Federal Trade Commission Act as amended, 38 Stat. 719, 15 U.S.C. §45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> (a)(6) The Commission is empowered and direct to

> prevent persons, partnerships, or corporations. . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

In addition, this case involves the following Constitutional provisions:

> Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> Amendment V. No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On December 6, 1971, the Federal Trade Commission entered an order directing both Standard Educators and its President, James A. Melley, Sr., to cease and desist from certain misrepresentations in the sale of books and encyclopedias. The Commission's order (App. 19a) and accompanying opinion (App. 23a) followed an evidentiary hearing before a Commission Hearing Examiner in which the evidence showed that in eleven instances sales representatives of Standard Educators had misrepresented the terms and conditions of sale to prospective purchasers.

A. Liability of James A. Melley, Sr. In His Individual Capacity.

As to the liability of James A. Melley, Sr. in his individual capacity, the administrative Complaint simply alleged that "he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and

practices hereinafter set forth." (J.A. 5).[1] This allegation was denied by Melley (J.A. 17), and was contested throughout the proceeding.

At the close of the evidentiary hearings, the Hearing Examiner dismissed the charges of the Complaint against Melley in his individual capacity. The Examiner, who had observed the demeanor of Melley on the witness stand, found that

> Complaint counsel do not point to any evidence -- and there is none in the record -- that Mr. Melley committed any illegal act in his individual capacity, or that Mr. Melley is likely to violate the Act in the future in his individual capacity, or that he will attempt to evade any order which may be issued against the corporate respondent. (J.A. 181-182).

On Commission counsel's appeal to the full Commission, this finding of the Examiner was reversed and the order was reinstated as to Melley in his individual capacity. The Commission found that Melley was aware of and authorized the deceptive practices (App. 30a), and therefore should be held individually liable. The Commission based this finding solely on a sales contract designed many years before by Melley which it found to be "an integral part of the deceptive sales practices." (App. 30a). However, neither the Complaint nor Commission counsel had ever alleged that the contract was deceptive, and indeed when counsel for Petitioners specifically asked "which, if any, of Standard Educators' written sales materials, advertisements or correspondence you claim are deceptive," Commission counsel did not identify the contract. (J.A. 46). Nevertheless, the Commission concluded that "the contract designed by Melley strongly suggests that the salesmen were authorized to sell encyclopedias in the deceptive manner charged, since it is unlikely that such contracts could

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[1] "(J.A.)" refers to the Appendix printed in connection with the Petition To Review in the United States Court of Appeals for the District of Columbia Circuit.

be supplied for any other purpose." (App. 31a).

The Commission attempted to correlate four admittedly non-deceptive contractual provisions with four allegedly deceptive representations made by the salesmen. The Commission claimed that a reference to a $3.95 delivery charge for a supplement "corresponds to the sales pitch that the additional cost was merely for postage and handling charges," that the spaces in the contract for military personnel to place their name, rank and serial number buttressed the deception that the offer was made to a specially selected group, i.e. the Armed Forces, that the provision requesting the purchaser to cooperate in expressing his opinion about the books supported misrepresentations that Standard Educators was conducting an advertising campaign, and finally that a reference to a "National Combination Offer" corresponded to the misrepresentation that the price was reduced if a combination of books were purchased. (App. 30a-31a).

The court of appeals affirmed the order as to Melley in his individual capacity. The court ruled that "a heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception." (App. 4a).

Judge Wilkey dissented from that part of the Court's opinion affirming Melley's liability in his individual capacity. He pointed out that "the Commission's findings rest on the inference that a deceptive use was intended to be made of concededly non-deceptive language" (App. 10a), and emphasized that

> What the Commission has done in its analysis of the contract is subtly to shift the burden of proof. For example, with regard to the testimonials, the Commission apparently felt that, once there was a showing that the contract clause actually corresponded to salesmen's misrepresentations, Melley bore the burden of demonstrating a legitimate purpose for the language. This approach no longer requires the complaint counsel to make a substantial

> showing that the prohibited purpose existed. It clearly conflicts with accepted notions of where the burden falls in such a proceeding. In addition, it is most unfair, since the Commission drew its inferences about intent after the hearing at which Melley could have presented rebuttal evidence. (App. 12a).

Judge Wilkey concluded by noting the personal and irreparable damage done to Melley by the Commission's action in shifting the burden of proof.

> By its unfounded order, the FTC has filched Melley's reputation – a crime more serious than the one alleged, for it enriches the Commission not and makes Melley poor indeed. (App. 15a).

B. Denial of Access To Documents Relating To The Allegedly Unlawful Seizure of Evidence.

Prior to the evidentiary hearings, Petitioners challenged the legality of a Commission investigation performed at the offices of Standard Educators in April and May 1967. (App. 33a). To support their contentions that the Commission's evidence in the case was the fruit of an unconstitutional search and seizure, Petitioners moved to depose David DiNardi, the Commission investigator who had seized documents from the files of Petitioners during the controverted investigation, and to subpoena documents in the Commission's files relating to the investigation. A Commission Hearing Examiner permitted the deposition, but denied subpoena access to pertinent documents in the Commission's files, reasoning that since "DiNardi will be offerred as a witness by complaint counsel at the hearing to testify in support of the allegations of the complaint, it is preferable that counsel for respondents examine Mr. DiNardi with respect to the documents called for in Schedule A of the subpoena duces tecum at the time Mr. DiNardi appears and testifies at the hearing in this proceeding. . . ." (J.A. 95).

At the opening of hearings, Petitioners formally moved for the exclusion of all evidence obtained by the challenged investigation on the grounds it had been seized without a

warrant or other lawful process and without the voluntary consent of Petitioners. (J.A. 235, 236). A preliminary evidentiary hearing was then held on the circumstances of the seizure. In order to carry its burden of establishing that the evidence was seized with the voluntary consent of Petitioners, Commission counsel put DiNardi on the stand. DiNardi testified that he had explained the purpose of the investigation to Melley and then made a "formal request" to examine and copy documents in Standard Educators' files. According to DiNardi, on the basis of the explanation and request, Melley then agreed to cooperate and made all of Standard Educators' records available to DiNardi. (J.A. 244-245, 278, 285).

Early during the cross-examination of DiNardi, Petitioners' counsel established that DiNardi prepared and signed field reports and file memoranda about his investigations at Standard Educators, that the reports were based on his handwritten notes, that he retained copies of these reports and notes, and that he had "reviewed" the reports and memoranda prior to testifying. (J.A. 257-264).

Petitioners' Motion for the production of the specified documents, both under the *Jencks* rule and because of their relevance to the search and seizure issue, was denied by the Examiner. (J.A. 266).

Thereafter, Melley took the stand and contradicted DiNardi's version of the investigation. Melley testified that DiNardi chilled Melley's initial intention to cooperate with the Commission by slurring Standard Educators' accounting techniques. And when Melley "rebelled" against giving DiNardi *carte blanche* to search through Standard Educators' files, and wondered whether he should call an attorney, DiNardi countered by noting that he, DiNardi, was an attorney, and that DiNardi "could get a court order and back up a truck and take all the records that I needed." (J.A. 297, 300, 308). DiNardi then remarked that Melley had "the wrong impression" of the Commission, and "since this is the first time you are being investigated, in all probability the worst thing that could happen to you would be a voluntary compliance."

DiNardi also noted that "the fact that [Melley] would cooperate should help" his position with the Commission. (J.A. 297, 298).

Melley thereafter decided to grant DiNardi's request for a file search, since he "figured, well, one way or the other, they are going to get all the information they need," and in any event, Standard Educators could not operate without its records if they were hauled away under court order. (J.A. 302, 314).

At the conclusion of the preliminary hearing on the search and seizure issue, the Examiner ruled that "this appears to me to be a voluntary cooperation with the investigator for the Federal Trade Commission, and the Motion for the suppression of evidence is denied." (J.A. 330).

On appeal by Petitioners to the Commission, the Commission ruled that the Examiner had erred in refusing to turn the DiNardi reports and documents over to Petitioners for use in cross-examining DiNardi. (App. 34a). But the Commission purported to cure this defect by striking DiNardi's testimony and deciding the search and seizure issue against Standard Educators solely on evidence adduced from Melley and a Vice President of Standard Educators. This, according to the Commission, rendered "unnecessary and immaterial the production of his [DiNardi's] notes and memoranda for the purpose of enabling [Standard Educators] to conduct an effective cross-examination of the witness." (App. 34a).

The Commission never directly addressed Petitioners' contention that access to relevant documents should be granted when the documents might contain evidence relating to the sharply contested factual issues surrounding the search and seizure. Instead, in a footnote the Commission declined to permit access to "an investigator's work product," citing this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). (App. 34a).

The court of appeals affirmed this part of the Commission's opinion without substantive comment. (App. 4a).

REASONS FOR GRANTING THE WRIT

1. Confusion and Conflict Over The Proper Standards For Imposing Individual Liability On Corporate Officers Under The Federal Trade Commission Act Caused The Court Below Subtly But Erroneously To Shift The Burden Of Proof On This Issue To Melley.

In 1937, this Court had its only full opportunity to consider the circumstances which would justify subjecting a corporate officer to a Federal Trade Commission order in his individual capacity. But that case, *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937), was an easy one. There, the record showed that the corporate officers had organized the corporation "for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent The Standard Education Society." *Id.* at 119. While observing that normally "a command to the Corporation is in effect a command to those who are officially responsible for the conduct of its affairs," this Court ruled that since "further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order." *Ibid.*

Thus, *Standard Education Society* made clear that where there is evidence that a corporate officer may attempt to evade an order entered against the corporation, by dissolving the corporation for example, an effective Commission order must also run against the potentially evasive corporate officer.

However, the *Standard Education Society* opinion added some additional comments which have created subsequent confusion at the Federal Trade Commission and in the federal appellate courts. It also noted that the corporation was closely held, owned, dominated, and managed by the corporate officers. *Id.* at 120. But the opinion did not make clear whether this Court was saying that domination and control could sometimes be sufficient standing alone, or whether additional

evidence showing a propensity to evade the order was also required before individual liability would attach.

As a result, the *Standard Education Society* ruling spawned two lines of cases. One line, initiated by Commission rulings, has held that mere domination and control of a closely held corporation was sufficient without more to hold the dominant corporate officers liable in their individual capacities for the acts of the corporation. For example, in *Consumers Home Equipment Co.* v. *FTC*, 164 F.2d 972 (6th Cir. 1947), a corporate officer was held liable in his individual capacity for deception in door-to-door sales simply because "during all the period involved [he] was an officer and director of the corporation, responsible for its policies and practices." *Id.* at 973. Similarly, individual liability attached to a corporate officer in *Steelco Stainless Steel, Inc.* v. *FTC*, 187 F. 2d 693 (7th Cir. 1951), solely on the basis of the Commission's finding that "by virtue of stock ownership, officership, and active direction, the policies, activities, and practices of the corporate respondent are his." *Id.* at 697.

Perhaps the baldest statement of this conception of the *Standard Education Society* opinion was made by the Second Circuit:

> We read this as meaning that such an order may include those officers of a corporation who are in top control of the activities that the Commission finds to have violated the Act. *Standard Distributors, Inc.* v. *FTC*, 211 F. 2d 7, 15 (2d. Cir. 1954).

Concurrently, however, another line of cases held that mere domination and control of a corporation are not sufficient to impose individual liability on a corporate officer. These cases came to full flower in *Flotill Products, Inc.* v. *FTC*, 358 F. 2d 224 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 179 (1967). There, the Ninth Circuit criticized the Commission for including individuals in an order based "on no other fact than that the three individuals owned and controlled the corporation." *Id.* at 233. The court ruled that

> the Commission has abused the discretion granted it in framing the order to include the individual petitioners. The rather cavalier use of the "alter ego" doctrine finds no support in the record, and the order points to no evidence to challenge the findings of the hearing examiner that the corporate entity has ever been used in such a way as to justify treating it as the "alter ego" of its owners. *Ibid.*[2]

The *Flotill* opinion had been foreshadowed by the Commission itself in *The Lovable Co.*, 67 F.T.C. 1326 (1965), where the corporate officers admitted that they directed and controlled the acts and practices of the corporation. This was insufficient according to the Commission. Instead,

> To justify naming an officer *as an individual* there must be something in the record suggesting that he would be likely to engage in these practices in the future as an individual. To argue otherwise would be to hold that in every order running against a corporation the officers who control its policies, acts and practices should be named. *Id.* at 1336-1337.

Both lines of cases purport to be based on this Court's *Standard Education Society* opinion – one on that portion which identifies the closely held nature of the corporation and one on that portion that focuses on the prior and likely future attempts to evade the Commission's order.

However, it would seem that the more recent court of appeals and Commission decisions require a showing that the corporate officer will be likely to evade the Commission's order. E.g., *Fred Meyer, Inc.* v. *FTC*, 359 F. 2d 351, 368 (9th Cir. 1966), *cert. and rehearing denied*, 386 U.S. 908, 978 (1967); *Doyle* v. *FTC*, 356 F. 2d 381, 385 (5th Cir. 1965). And see Whiting, Antitrust and the Corporate Executive, 47 Va. L. Rev.

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[2] Accord: *Coro, Inc.* v. *FTC*, 338 F. 2d 149, 154 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

929, 969 (1961). Indeed, the Federal Trade Commission in the instant case correctly articulated the standards for including a corporate officer under order in his individual capacity based on the Ninth Circuit's opinion in *Fred Meyer, supra*:

> (1) the individuals "owned and controlled the closely held, family corporation; (2) they set the policies and reviewed the practices of the corporation; and (3) they knew of and authorized the alleged illegal practices." (App. 28a).

But despite this apparent recent ascendancy of the cases holding that mere ownership and control of the corporation is not enough, the court of appeals below used the fact of Melley's ownership and control of Standard Educators to justify subtly shifting the burden of proof to him. Per the court,

> A heavy burden of exculpation rests *on the chief executive officer and primary shareholder of a closely held corporation* whose stock-in-trade is overreaching and deception. (App. 4a). (Emphasis added.)

As the dissent below so eloquently stated (App. 4a – 15a), the effect of this formulation is to subtly shift the burden of proof to the corporate officer by virtue of his ownership and control -- in violation of accepted notions of administrative fair play, the Administrative Procedure Act,[3] and the Commission's Rules of Practice.[4]

Such a shift in the burden of proof is precisely what occurred here. The Commission found that Melley knew of and authorized the deceptive practices (App. 30a), and the court of

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[3]Section 7(d) of the Administrative Procedure Act provides: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d).

[4]Section 3.43(a) of the Commission's Rules of Practice provides: "Counsel representing the Commission. . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a).

appeals held that this finding was amply supported by the record. But to do this, the Commission and the court were forced to ignore the fact that there was absolutely no evidence that Melley ever participated in or instructed Standard Educators' sales representatives to engage in these practices.[5] The sole connection between Melley and the deceptive practices that anyone has pointed to was a contract that Melley prepared in the infancy of the business by copying the contracts of competitors. Nevertheless, the Commission found that "this contract was an integral part of the deceptive sales practices challenged in the complaint, and that Melley's development of the contract, which was so closely tied to these illegal practices, makes it obvious that he was not unaware of the sales tactics of his salesmen and that he approved their use." (App. 30a).

The burden of proof on Melley's intent in designing the contract was obviously critical to the court's ruling and the Commission's finding, since there was virtually no proof concerning the contract in the record. In the first place, the Commission never claimed that the contract was deceptive, and did not argue that Melley's intent in drafting the contract was to foster the deceptive practices until after the record was closed. Moreover, the only testimony concerning the contract was that it was drafted by Melley and his sales managers "as a result of looking at a number of contracts from competitive companies." (J.A. 365).

But by placing a "heavy burden" on Melley, the court below was able to sustain the Commission's finding that "the contract designed by Melley strongly suggests that the salesmen were authorized to sell encyclopedias in the deceptive manner charged, since it is unlikely that such contracts could be supplied for any other purpose." (App. 31a). In the absence of

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[5] To the contrary, the record showed that Melley and the corporation took active steps to prevent the kind of practice challenged by firing salesmen guilty of deception (App. 8a; J.A. 404), and by structuring the business to minimize the possibility of deceptive statements being made during a sales presentation by a Standard Educators' representative. (J.A. 178-179).

this erroneous shift of the burden of proof, the obvious inference from the record is that each of the contract provisions attacked by the Commission does have another quite legitimate purpose unrelated to any potential deceptive use as a sales tool.

Thus, the provision by which a purchaser agrees to cooperate "in expressing my opinion of the New Standard Encyclopedia" was used to solicit letters for use in selling to other future purchasers. (R. 1084). This is a legitimate sales technique used by Standard Educators, and is in no way illegal.

As to the space in the contract for armed service identification information, the record shows that a substantial portion of Standard Educators' sales are made to military personnel. It is not only natural, but necessary to have this information in connection with long term sales accounts, where the purchaser is likely to change duty station frequently. The Commission itself found that this was why space for this information was placed in the contract. (App. 47a). It would seem permissible for Melley to design a contract to request information from purchasers which would facilitate the collection of the contract, without subjecting him to innuendo that the space for the information was placed in the contract, not to obtain the information, but to assist in deceptive practices by Standard Educators' salesmen.

The reference to "$3.95 each year for delivery of the Quarterly Extension Service and Binder" (J.A. 653) is simply a reference to the fact that it costs each purchaser $3.95 a year to obtain the supplements to keep his encyclopedias current. By contrast, the allegation in the Complaint was that Petitioners represented that "the additional cost of $3.95 for the annual yearbook is for *postage and handling charges.*" (J.A. 8). It would seem that if Melley, in drafting the contract, had wanted to assist in this alleged deception, he would have had the contract say "postage and handling" as well.

Finally, the reference to the "National Combination Offer" simply reflects the method by which Standard Educators sold its books. As reflected on Standard Educators' price list, books were normally sold in combinations at price levels starting at $149.50 for the basic encyclopedia and increasing by

increments of $50.00, depending on how much additional merchandize was ordered (R. 1161). By assigning point values, rather than dollar values, to the additional books, purchasers were enabled to select various combinations of books at the particular price level they wished, thus easing the paperwork load of the office staff. (App. 10a – 12a).

In short, the shift in the burden of proof enabled the Commission and the court to sustain findings based on a sales contract which is completely innocuous on its face. (J.A. 653-654). If left standing, the court of appeals' formulation of the burden on the "chief executive officer and primary shareholder of a closely held corporation" will have important consequences for the administration of the Federal Trade Commission Act. Numerous small, closely held corporations and their dominant officers are charged by the Federal Trade Commission each year with violations of the Federal Trade Commission Act. The individual liability of the corporate officers is a recurrent issue that has often found its way to the courts of appeals due to the dichotomy in the cases over the appropriate standards to be applied in assessing individual liability. It is time for this Court to speak on this issue. But it is more imperative than ever since the ruling of the court below threatens to convert a mere confusion in the governing criteria into a dramatic shift in the burden of proof with far reaching implications for how such corporate officers will prepare and present their defense in cases before the Commission.

2. Administrative Agencies Must Not Be Permitted To Cover Up Illegal Investigative Searches By Denying Litigants Access To Documents Directly Bearing On The Legality Of The Investigation.

This Court has long held that evidence seized in violation of the Fourth Amendment's ban on warrantless searches is inadmissible in criminal proceedings. *Weeks* v. *United States*, 232 U.S. 383, 398 (1914); *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-457 (1971). And this Court has specifically ruled that administrative investigations are held to the same high standards

under the Fourth Amendment as criminal investigations, whether the investigation be at a private residence or a commercial enterprise. *Camara* v. *Municipal Court*, 387 U.S. 523, 530 (1967) ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior"); *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967) (similar).

However, in the teeth of these rulings, the Federal Trade Commission has consistently refused to disclose documents in its files directly relating to investigations challeged as in violation of the Fourth Amendment, thereby hobbling efforts to raise effectively the issue of an illegal search and denying administrative due process to litigants before it.

For example, in *Knoll Associates, Inc.*, 65 F.T.C. 1304 (1964), Knoll challenged the admissibility of evidence offered by the Commission on the ground that it was illegally seized, alleging that documents had been stolen from Knoll by a disgruntled employee and given to the Commission for use in the Commission's case against Knoll. Simultaneously, Knoll moved for the production of documents in the Commission's files relating to the investigation and seizure of the evidence. Production was initially denied by the Hearing Examiner and the Commission. *Knoll Associates, Inc.*, 65 F.T.C. 1304 (1964).

In an interlocutory action which resulted in no formal order or opinion, the Second Circuit "strongly indicated" during oral argument that the information sought by *Knoll* should be produced. See 70 F.T.C. 311, 420 (1966). As a result, the Commission reluctantly ordered that all documents in the Commission's files relating to the seizure of the documents should be turned over to Knoll. See 66 F.T.C. 1585, 1586 (1964).[6]

[6]There can be little doubt that pertinent documents must be turned over to a litigant raising a search and seizure issue. For example, in *United States* v. *Como*, 340 F. 2d 891, 893 (2d Cir. 1965), the court found that Como's purported consent to a search was the "product of deceit and coercion," based in part on "the agents' contemporaneous reports [that] he 'became very frightened'." And in *Baker* v. *United States*, 401 F. 2d

Ultimately, Knoll was able to persuade the Seventh Circuit that the controverted evidence was illegally seized -- based partly on the documents produced. *Knoll Associates, Inc.* v. *FTC*, 397 F. 2d 530, 534-535 (7th Cir. 1968).

The Federal Trade Commission has apparently learned nothing from the strong, but informal indications by the Second Circuit in *Knoll* that documents in the Commission's files relating to an allegedly illegal search and seizure must be turned over to a respondent. In support of its motion to suppress in the instant case, Petitioners showed that a Commission investigator made a warrantless investigation and seized documents and evidence from Standard Educators' files, and that this evidence was used in the prosecution of Petitioners. (J.A. 149-152). The Commission defended on the grounds that Melley had voluntarily consented to the search, and put the investigator on the stand to testify as to the circumstances of the investigation. (App. 34a). Thereafter, Petitioners conclusively established that documents existed in the Commission's files relating to the facts of the investigation, and that indeed the Commission investigator actually consulted these documents prior to testifying at the suppression hearing. (J.A. 257-264).

Nevertheless, the Examiner refused to make these documents available to Petitioners (J.A. 266). And the Commission refused to correct this error, although conceding that the documents should have been made available under the Jencks rule,[7] but not to aid Petitioners' efforts to establish an illegal

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958, 984 (D.C. Cir. 1968), the court held that defendant was entitled to inspect all records relating to a telephone surveillance to determine if illegally seized evidence pertained to him. Moreover, Section 6(d) of the Administrative Procedure Act provides that "Agency subpenas authorized by law *shall be issued to a party* on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." 5 U.S.C. §555(d). (Emphasis added.)

[7]The Federal Trade Commission has held the Jencks rule, as embodied in *Jencks* v. *United States*, 353 U.S. 657 (1957) and the Jencks Act, 18 U.S.C. §3500, directly applicable to FTC proceedings. *Inter-State Builders, Inc.*, 69 F.T.C. 1152 (1966).

search.[8] (App. 34a). Ultimately, the court of appeals sustained the Commission. (App. 4a).

These secret documents which were withheld from Petitioners may have contained critical information which would have helped establish that DiNardi used a combination of threats and promises to elicit Melley's "cooperation" in the investigation. The investigation occured almost three years prior to the suppression hearing, and the memories of DiNardi and Melley had quite naturally dimmed. Both had trouble recalling the exact words used which could have been important in any determination of whether Melley's consent was voluntary.

In light of these circumstances, it is clear that a definitive pronouncement is needed from this Court that documents relating to an allegedly illegal search must be made available in the context of administrative proceedings. This is the un-

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[8]The Commission erroneously justified its refusal to turn these relevant documents over to Petitioners with a footnote reference to *Hickman* v. *Taylor*, 329 U.S. 495 (1947), and the observation that "we find no basis whatsoever for respondent's contention that an investigator's work product must be turned over to the respondent to jog the memory of its own witness." (App. 34a). However, there was no showing that the documents demanded were in fact work product. Some of the documents, such as DiNardi's expense voucher needed to establish when DiNardi first interviewed Melley, are clearly not work product. And rather than the statements of witnesses interviewed by an attorney that were involved in *Hickman*, Petitioners were seeking DiNardi's own statements -- not for what Melley may have said to DiNardi, but for how and what DiNardi said to Melley to extract evidence from Standard Educators' files.

Moreover, a Commission investigator, even if an attorney, cannot conceal relevant documents on the grounds of work product since he is not an attorney engaged in preparation for litigation. The same defense to disclosure was raised by the Department of Justice in connection with reports by FBI investigators who were also attorneys, and was flatly rejected. *O'Neill* v. *United States*, 79 F. Supp. 827, 829 (E.D. Pa. 1948), *rev'd on other grounds sub nom, Alltmont* v. *United States*, 177 F. 2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950). See also *Newell* v. *Capital Transit Co.*, 7 F.R.D. 732, 734 (D.D.C. 1948).

questioned rule in criminal cases, *Alderman* v. *United States*, 394 U.S. 165 (1969), and such a holding would be a natural development from *Camara* and *See*, which did not reach this question.

Only after such a ruling will recalcitrant agencies like the Federal Trade Commission ventilate their files so that the full truth may be available during suppression hearings.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Ronald J. Wilson
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Washington, D.C. 20006

Counsel for Petitioners

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1164

STANDARD EDUCATORS, INC. AND
JAMES A. MELLEY, SR., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to Review an Order of the
Federal Trade Commission

Decided March 9, 1973

Ronald J. Wilson for petitioners.

Nicholas S. Reynolds, Attorney, Federal Trade Commission, with whom *Harold D. Rhynedance, Jr.*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before WRIGHT and WILKEY, *Circuit Judges*, and RICHEY,* *District Judge*.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1970).

Opinion *per curiam.*
Dissenting opinion filed by Circuit Judge Wilkey at p. 4.

PER CURIAM: This case is here on a petition to review an order of the Federal Trade Commission. The Commission directed its order against James A. Melley, Sr. in his individual capacity, as well as against the company, because it found that Melley knew of and approved many of the false and deceptive practices. Testimony before a hearing examiner showed that Melley was the organizer of the company, served as its president and treasurer, and owned 51 per cent of its stock. In the company's infancy he did much of the selling himself, and although at the time in question Melley no longer engaged in any selling himself, he still, in the words of the trial examiner, "spends his time in the office supervising the over-all operations • • •." In addition, he devised the form contract used by the company's salesmen, a contract whose provisions were an integral part of the deceptive scheme. All of these factors, combined with the uncontradicted proof of widespread instances of deceptive practices by company salesmen, support the Commission's finding that Melley knew of and approved the deceptive practices. *See Fred Meyer, Inc.* v. *F.T.C.*, 9 Cir., 359 F.2d 351, 368 (1966).

The Commission introduced testimonial evidence as to 12 typical sales, dating from February 1965 to May 1968, taking place at sites as widespread as Oahu, Hawaii, Colorado Springs, Colorado, Groton, Connecticut, Portsmouth, New Hampshire, and Havre de Grace, Maryland.[1] The same oral misrepresentations were made in every one

[1] We might add, in response to the dissent's unwarranted characterization of these instances as "scattered misrepresentations," that petitioners' own counsel sought to limit the number of customer-witnesses that could be called by the Commission in order "to reduce the case to manageable and realistic proportions" and to avoid burdening petitioners.

of these cases, and in each the pattern of deception was facilitated by the contract written by Mr. Melley. The Commission does not engage in speculation when it rejects the conclusion that these similarities occurred purely by coincidence and instead infers that they were the result of direction from above.

In drawing inferences about the knowledge of corporate officers in cases such as this, the Commission properly draws upon its expertise. And where it does so, our guiding principle in reviewing the Commission's findings of fact is Mr. Justice Black's statement for a unanimous Court in *F.T.C.* v. *Standard Education Society*,[2] 302 U.S. 112, 117 (1937):

> "The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony. The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. * * *"

(Footnote omitted.)

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[2] It is interesting to note that, although the Standard Education Society is apparently not related to Standard Educators, Inc., the record does indicate that when he incorporated Standard Educators, Inc. Mr. Melley made arrangements with Standard Education Society to purchase its line of encyclopedias for resale to the public. Standard Education Society also provides the broadsides used by Standard Educators' salesmen in their sales presentations. In addition, the false and deceptive practices of Standard Educators, Inc. parallel in many respects the false and deceptive practices condemned in *Standard Education Society*, including: representing that encyclopedias are given away free or sold at a specially reduced price to selected persons in return for use of the purchaser's name for advertising; representing that the recipient pays only for purchase of a 10-year annual yearbook extension service; and representing that the recipient was getting a special combination offer not generally available.

In this case, the conclusion that Melley knew of and authorized the deceptive practices was amply supported by evidence of record. A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.

The other issues raised by petitioners are without merit, and were dealt with at length in the Commission's careful, well reasoned opinion. Accordingly, the order of the Commission is

Affirmed.

WILKEY, *Circuit Judge*, dissenting: The illegal practices alleged in this case were false and deceptive statements made by individual salesmen of Standard Educators, Inc., in connection with door-to-door sales of encyclopedias. I agree with the majority that substantial evidence supports the FTC's findings that such statements were made. I agree that the corporation, acting through its salesmen, violated the Federal Trade Commission Act.[1]

I cannot agree with the majority's affirmance of the Commission's decision to direct its cease and desist order against James A. Melley, Sr., in his individual capacity. The FTC and the majority repeatedly stress the existence of admitted violations by salesmen. That simply gets them nowhere on the issue of Mr. Melley's personal involvement, although it does, of course, support the FTC's decision against the corporation, with which I agree. As regards Mr. Melley, I find the Commission's opinion neither "careful" nor "well reasoned." To the contrary, it is unsupported and cavalier.

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[1] 15 U.S.C. § 45 (1964).

As the Commission itself notes in its opinion here, "[t]he rationale for subjecting respondents in their individual capacities to Commission orders is to assure that such orders will be fully effective in preventing the unlawful activities."[2] This rationale necessarily implies that some connection must be established between the individual respondent and the alleged unlawful practices. If a proven connection were unnecessary, the Commission could conceivably proceed to order each and every U.S. citizen or resident to cease all imaginable illegal practices within the FTC jurisdiction. The very nature as a "cease and desist" order implies that the named individual was at least indirectly involved in the past, or is likely to participate in the future, in the activities which the Commission wants stopped. In short, naming individual respondents in a case like this "is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate . . ." the relevant statute. *Flotill Products, Inc.* v. *FTC*.[3]

Although the degree of personal involvement in the alleged violations which justifies individual direction of a cease and desist order has been variously articulated, mere ownership and control of an offending corporation, whose employees have committed the charged violations, is not enough.[4] Mr. Melley was in fact the majority shareholder, President, Treasurer, and Chairman of the Board of Standard Educators. However, a more specific and

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[2] Appendix (hereafter "App.") at p. 200.

[3] 358 F.2d 224, 233 (9th Cir. 1966).

[4] See *Flotill Products, Inc.* v. *FTC* where reliance, in naming individuals in the order there, "on no other fact than that the three individuals owned and controlled the corporation" was accurately described as "rather cavalier." 358 F.2d 224, 233.

substantial connection *with the violations* must be (but was not) shown to justify the order issued against him here. Rather than establishing such a connection, the FTC's opinion, as it relates to Melley individually, ignores a highly experienced hearing examiner's findings, goes far beyond proper inference, engages in cynical and unwarranted speculation, and finds no support in the record.[5]

This is not a case in which a likelihood of future violations has been shown, for example, by evidence that the corporation involved was formed for the purpose of evading FTC orders. Compare *FTC* v. *Standard Education Society, et al.*[6] Hardly a "fly by night" operation, Standard Educators, Inc., enjoyed a stable corporate existence since its founding in 1957. There is absolutely no evidence in the record to support a finding that Mr. Melley would attempt to play the "shell game."[7]

This is not a case in which the deceptive practices were so intertwined with company policy that the responsible corporate officers could be fairly deemed to have known of and approved the violations. Compare *FTC* v. *Standard*

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[5] The hearing examiner specifically noted that "Complaint counsel did not point to any evidence—*and there is none in the record*—that Mr. Melley committed any illegal act in his individual capacity, or that Mr. Melley is likely to violate the act in the future in his individual capacity, or that he will attempt to evade any order which may be issued against the corporate respondent." App. at pp. 181-182 (emphasis added).

[6] 302 U.S. 112 (1937).

[7] The hearing examiner specifically noted that "[t]here is no evidence of record to indicate that the corporate entity is a sham or that Mr. Melley organized the corporation in an attempt to evade any order which may be issued . . . ." App. at p. 183.

Education Society, et al.[8] and *Benrus Watch Company* v. *FTC*.[9] To the contrary, the Commission proved only scattered misrepresentations perpetrated by individual salesmen.[10] The only evidence of central corporate policy came from Melley himself and was apparently credited by the hearing examiner. Mr. Melley testified that the company had a strong policy against misrepresentations and fired salesmen who were found to have engaged in deceptive practices.[11]

This is not a case in which widespread knowledge of the offenses in the community justified an inference that

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[8] The offense charged there involved a "well-matured" "general sales plan" "outlined in letters going directly from the companies." 302 U.S. 112, 115-17 (1937).

[9] 352 F.2d 313 (8th Cir. 1965). The violation charged concerned preticketing of merchandise. That practice was of the sort necessarily planned and supervised as a matter of company policy, and could hardly have originated with a frolic and detour by individual non-policymaking employees. Therefore, the fact that the officers involved "formulated, directed and controlled the policies and practices of the corporate respondents" was enough to justify individual direction of the cease and desist order. 352 F.2d 313, 324. See also *Pati-Port, Inc.* v. *FTC*, 313 F.2d 103 (4th Cir. 1963), where the individuals named had, on request from a subordinate, specifically approved the illegal practices.

[10] Testimony was introduced concerning twelve sales at scattered sites during a period from February 1965 to May 1968. A dispersed pattern of abuse might well merely suggest that dishonest salesmen get around and pick up the tricks of their trade from each other. Even if central control is inferable, *who* sent directives from above would still not have been shown. Indeed, their widely scattered character could increase the chances that company headquarters would not learn of violations.

[11] Mr. Melley testified that if salesmen "are caught in misrepresentation, they are fired." App. at p. 404.

the corporate officers closely involved must also know of and approve the violations. Compare *Fred Meyer, Inc., et al.* v. *FTC*.[12] Mr. Melley did admit that he knew the company was receiving a "very minimum" number of customer complaints, "maybe one a month."[13] For a company doing over $2,000,000 in sales to individual customers (in 1969), that level of customer dissatisfaction was hardly high enough to support an inference of knowledge of pervasive deceptive practices. Since Melley went on to explain how he sought to discipline salesmen and satisfy the complaining customers, an inference of approval of these abuses is even more far-fetched.

Even assuming that the illegal practices could or should have been known to those directing the company on a day-to-day basis, this is not a case in which personal knowledge could be fairly attributed to the individual officer actually named. Compare *Coro, Inc.* v. *FTC*.[14] While Melley was deeply involved in the corporation's early beginnings, he had almost completely withdrawn from routine supervision of its affairs at the time when the violations charged here occurred. The only evidence concern-

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[12] 359 F.2d 351 (9th Cir. 1966), *cert. denied*, 386 U.S. 908 (1967). In that case, the court noted that "despite Meyer's denials of knowledge of the operations of his business, the Commission was justified in concluding that 'if a majority of Portland's 120,000 families were apprised of the details of these [deceptive] programs, we think it is a fair inference that the Chairman of the Board also knew about them.'" 359 F.2d 351, 368.

[13] App. at p. 380.

[14] 338 F.2d 149 (1st Cir. 1964). "In the absence of evidence of personal involvement in Coro's [the company's] unlawful conduct," a showing of "overall corporate responsibility" was held *not* enough to support direction of the cease and desist order against an individual who was the largest corporate shareholder, President, and Chairman of the Board.

ing his actual degree of involvement indicates that, while some important matters were occasionally brought to his attention, he didn't "seem to have too many duties any more," [15] didn't "watch sales that closely," [16] no longer hired or trained salesmen,[17] and in fact was so removed from the business that he did not even really know how many salesmen were actually employed.[18]

This is not a case in which documents distributed by the company, and used by salesmen, were themselves found to be deceptive. Compare *Consumer Sales Corp.* v. *FTC* [19] and *Steelco Stainless Steel* v. *FTC*.[20] There is absolutely no finding, nor could there be a reasonable one, that the contract used was on its face in any way misleading. This last point is highly significant because, when stripped of merely conclusory language, the Commission's opinion finding personal involvement appears to be based solely on the fact that Mr. Melley helped to draft the sales contract.

Although not finding the contract itself deceptive, the FTC and the majority here describe that document as "an

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[15] App. at p. 362.

[16] App. at p. 351.

[17] App. at p. 198.

[18] App. at p. 351.

[19] 198 F.2d 404 (2nd Cir. 1952). In this case, deceptive order forms furnished by the company supported an inference that the corporate officers "actively encouraged and participated in making the false representations." 198 F.2d 404, 407.

[20] 187 F.2d 693 (7th Cir. 1951). Since the literature provided by the company, in this case, was held to be deceptive in its own right, the corporate officers could not escape responsibility just because even more misleading statements were made by salesmen.

integral part" of the deceptive sales practices challenged in the complaint.[21] The Commission concludes that it is "unlikely" that the form used could have been "supplied for any other *purpose*" than that of enabling and authorizing salesmen to "sell encyclopedias in the deceptive manner charged."[22] No direct evidence supports such a view. Indeed, Melley testified that the operative reason for the selection of the actual contract format was a perhaps lazy, but otherwise blameless, decision to copy the clauses used by the competition.[23]

The Commission's findings rest on the inference that a deceptive use was intended to be made of concededly nondeceptive language. If it were the case that the language of the contract had no other reasonable and commercially proper use, such a gossamer inference just might withstand scrutiny. However, all of the contract clauses singled out by the Commission do have legitimate and nondeceptive functions.

The FTC suggests that the spaces provided for filling in military service information were designed to facilitate salesmen's claims that, as a member of the military, the customer was getting a special price. Yet, at another place in the very same opinion, the Commission mentions the more obvious, legitimate, and I submit the actual, purpose for collecting this data: the customer location "problem . . . created by . . . [the] business policy of directing sales to military personnel."[24] Since that group is extremely mobile, detailed and accurate military service information was essential to keep track of people who had installment obligations to fulfill.

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[21] App. at p. 198.

[22] App. at p. 199 (emphasis added).

[23] App. at p. 365.

[24] App. at p. 217.

The FTC notes that the contract mentions a charge of $3.95 "for delivery" of an extension service and binder. Their contention is that this language was intended to buttress the salesmen's fiendishly deceptive claim that the additional cost was merely for "postage and handling charges." Given the fact that $3.95 was indeed the total price, I find it difficult to share the Commission's grave concern about the misleading effect of this oral representation. Even if I did share that concern, I would still be persuaded that a contract drafted with intent to support the "postage and handling" characterization would use that precise language rather than the more ambiguous "for delivery" term.

The FTC further argues that this scheme of deception was writ large in the contract's reference to the "National Combination Offer." Whatever the salesmen may have said, falsely, about lower prices for larger purchases, the fact remains that this phrase refers to a perfectly legitimate method by which Standard Educators sold its books. By assigning point values, rather than dollar values, to additional books sold in $50 increments above the basic encyclopedia, the company offered flexibility and benefited from simplified accounting. Since the Commission has not characterized this as an illegal "tie in," how the mere reference to this legitimate marketing system shows the contract authors' purpose to deceive remains a mystery to me.

Finally, the FTC claims that the contract provision calling for the customer's agreement to give his opinion on the New Standard Encyclopedia demonstrates an intention to bolster the salesmen's suggestion of a special price offered in exchange for an endorsement. Apparently, the Commission completely overlooked the more obvious possible purpose for this contract clause: an actual desire to obtain testimonials for use in advertising the product. The technique of advertising by testimonials has not, so

far, been ruled illegal. As with the previously cited inferences, the Commission has chosen the one explanation of the contract drafters' purpose, in preference to the many possible legitimate ones, which leads to a finding of intent to deceive; and it has made its choice for no other reason, from all that appears in the record, than that the desired result of holding Mr. Melley individually responsible could thereby be reached.

What the Commission has done in its analysis of the contract is subtly to shift the burden of proof. For example, with regard to the testimonials, the Commission apparently felt that, once there was a showing that the contract clause actually corresponded to salesmen's misrepresentations, Melley bore the burden of demonstrating a legitimate purpose for the language.[25] This approach no longer requires the complaint counsel to make a substantial showing that the prohibited purpose existed. It clearly conflicts with accepted notions of where the burden falls in such a proceeding. In addition, it is most unfair, since the Commission drew its inferences about intent after the hearing at which Melley could have presented rebuttal evidence. Once Mr. Melley's counsel had established that the contract itself was not deceptive, he might well have reasonably concluded that his need to present further evidence on the language used had ended. Given the extremely tenuous nature of the FTC's further inferences from the contract's language to its drafters' purpose, I for

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[25] Presumably, Melley might have met this novel burden by showing that an ad campaign based on testimonials was in fact conducted. However, even if the contract clause had been inserted with a bona fide intent to collect endorsements, there are many possible reasons why an ad campaign might not in fact have resulted. In that event, the difficulties of showing a proper purpose merely highlight the need for scrupulous care whenever guilty intent is presumed and the accused must prove the negative.

one cannot blame Melley's counsel for failing to anticipate and rebut them.

This case comes down, in the end, to questions of Mr. Melley's state of mind—his purpose in drafting the contracts and his knowledge of the detailed practices of salesmen in the field. That question necessarily turns to a large degree on the credibility of Melley's testimony; and the hearing examiner, who had the best opportunity to assess Melley's credibility, believed him.

The Commission obviously wanted very badly to overturn the hearing examiner's ruling. It took an unlikely end run via inferences that contract language, innocent on its face and serving other legitimate purposes, was *intended* to be used for deception merely because it was *actually* so used by some salesmen. That sort of analysis would justify an inference that a company officer who authorized door-to-door sales must have intended to foster misrepresentation because that method of sale may provide the personal contact necessary for an unscrupulous and talented salesman to convince the customer that he is getting a special price because he lives at that address, came to the door within one minute, or has a nice face. Everything that facilitates a sale *could* be labelled "an integral part" of the *salesman's* deceptive scheme; but, when a possible proper use appears, and absent additional evidence, the intent of the supplier that it be used deceptively should not be so lightly inferred.

Though this court normally gives deference to administrative agency decisions, if supported by testimony, I am not aware of any "expertise" in the Federal Trade Commission which permits it to find an individual responsible for deceptive conduct, and to issue a cease and desist order against that individual, when no evidence in the record makes the inference it draws any more likely than an inference clearing him of personal responsibility. That

this court need not respect a greater aptitude in the FTC for drawing deductive logical conclusions is amply demonstrated by the outrageous manner in which the Commission has constructed its "chain" of "reasoning" in this case.

It seems to me that affirmance here either changes the law by holding corporate officers individually liable to cease and desist orders with regard to acts with which they had no connection, save their "mere ownership and control," *or* it gives the FTC a mandate to exercise no less than mystical powers. The Commission may, under the sort of reasoning approved here, act not on the basis of the record created by its complaint counsel but on sheer instinct. Heretofore such a modus operandi has been more common in the sensational press than in quasi-judicial proceedings.

Since Melley has not been shown *ever personally* to have participated in *any* deceptive practice, he is not even being given the dubious benefits of the "bad man" theory. This record would not even support a high-handed attempt to enjoin, and therefore brand as a likely offender, one with a proven "predilection" to violate the law.

Rather, it appears that the FTC and the majority have carved a new niche in the law for "guilt by office" and "guilt by association." Mr. Melley is saddled with a "heavy burden of *exculpation*" even though no *inculpating* evidence (beyond mere ownership and control—which is *not* enough) has been introduced! The majority seems to find that "we know your type" is acceptable logic[26]—at

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[26] This approach is highlighted by the elaborate but irrelevant exposition by the majority, in footnote 2, attempting to link this case to *Standard Education Society*. Mr. Melley's former legitimate business dealings with that firm, of course, have no probative value. The similarity of the conduct of

least when applied to a corporation executive rather than a common criminal.

I recognize that there are in fact different standards of proof in criminal trials and civil cease-and-desist order proceedings. But the lower standard in this kind of case surely cannot be so low that it amounts to *no* standard of proof or indeed, as here, actually shifts the burden once complaint counsel has rested on a wink or a leer.

Nor can the absence of criminal penalties support an argument that Melley is not harmed by being individually named in the cease and desist order. The upright man need not fear the *direct* impact of an injunction commanding him to remain honest. But the very existence of the order tells the whole world, unless it too is enjoined, that he alone has been found likely to transgress. By its unfounded order, the FTC has filched Melley's reputation —a crime more serious than the one alleged, for it enriches the Commission not and makes Melley poor indeed.

I respectfully dissent.

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salesmen in both cases may testify to the endurance of the confidence game—but it simply cannot show Mr. Melley's personal involvement in their violations. Recognizing this, the majority is reduced to listing these facts as merely "interesting to note"—exactly the sort of improper "raised eyebrow" technique in which the Commission was engaged.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1164

STANDARD EDUCATORS, INC. AND
JAMES A. MELLEY, SR., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Before: Wright and Wilkey, Circuit Judges, and Richey* District Judge of the United States District Court for the District of Columbia

AMENDED JUDGMENT

This cause came on to be heard on the record from the Federal Trade Commission and was argued by counsel. On consideration of the foregoing and respondent's subsequent motion to correct judgment, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Trade Commission appealed from in this cause is hereby affirmed and enforced in its entirety, and petitioners are commanded to obey the terms of the order of the Commission.

in accordance with the opinion of this Court filed herein on March 9, 1973.

Per Curiam
For the Court

Hugh E. Kline
Clerk

Dated:
Opinion Per Curiam
Dissenting opinion by Circuit Judge Wilkey.
*Sitting by designation pursuant to 28 U.S.C. § 292(a) (1970)

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of	)	
	)	
STANDARD EDUCATORS, INC., a corporation, and	)	DOCKET NO. 8807
JAMES A. MELLEY, SR., individually and as an officer of said corporation.	)	FINAL ORDER

This matter having been heard by the Commission upon respondent Standard Educators' appeal from the initial decision, and upon complaint counsel's appeal from that part of the initial decision dismissing as a respondent, James A. Melley, Sr., and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having concluded that on this record and the facts and circumstances set forth therein, it is necessary to hold respondent James A. Melley, Sr., a party to this proceeding and that the order should be directed against him both as an officer of the corporation and as an individual;

IT IS ORDERED:

(1) That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;

(2) That the following paragraph be, and it hereby is, substituted for the initial paragraph of the order contained in the initial decision:

> IT IS ORDERED that respondents, Standard Educators, Inc., a corporation, and its officers, successors or assigns, and James A. Melley, Sr., individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of encyclopedias, books or publications or supplements in connection therewith or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from::

(3) That the word "respondents" be, and it hereby is, substituted for the word "respondent" wherever it appears in the order contained in the initial decision, and that the word "respondents' " be similarly substituted for the word "respondent's";

(4) That the order contained in the initial decision, modified as herein provided, be, and it hereby is, adopted as the order of the Commission.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail

the manner and form in which they have complied with the order to cease and desist.

By the Commission.

S E A L

Charles A. Tobin,
Secretary.

ISSUED: December 6, 1971

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of	)	
	)	
STANDARD EDUCATORS, INC.,	)	DOCKET NO. 8807
a corporation, and	)	
JAMES A. MELLEY, SR.,	)	OPINION OF THE
individually and as an officer	)	COMMISSION
of said corporation.	)	

By Commissioner Jones:

In January 1970, the Commission filed a complaint against Standard Educators, a corporation, and James A. Melley, Sr., as an individual and officer of said corporation, charging violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45 (1964), in the door-to-door sale of encyclopedias through the use of various false and deceptive statements relating to the terms and conditions in the sale of books.[1]

[1]The following abbreviations will be used for citations: Transcript of proceedings, "Tr."; complaint counsel's exhibits, "CX"; and Examiner's Initial Decision, "ID". Briefs of either the respondent (Res.) or complaint counsel (C.C.) will be cited as follows: Brief on appeal, "App. Br."; answering brief, "Ans. Br."; and reply brief, "Rep. Br."

Respondents denied the allegations and the matter proceeded to hearing on July 7, 1970. The hearing examiner concluded that the allegations had been proven with respect to the corporate respondent but determined that it was not necessary to enter an order against Mr. Melley in his individual capacity and that the complaint against him should be dismissed.

In its appeal, respondent[2] does not challenge the findings and conclusions of the examiner with respect to the factual basis underlying the allegations of violation. Rather, respondent rests its appeal on three principal contentions:

1. Respondent contends that evidence secured by the Commission investigator in 1967 was in violation of the Fourth Amendment and that the hearing examiner committed error in failing to order the production of memoranda in the Commission's files dealing with the allegedly illegal investigation;

2. Respondent contends that its right to cross-examine was curtailed and, therefore, it was denied due process in the course of the hearing because: (a) counsel supporting the complaint failed to make timely delivery to it of the final witness list with correct addresses as required by pre-trial order, and (b) the hearing examiner refused to grant respondent's request for depositions on written interrogatories;

3. Respondent challenges the propriety of the entry of an order against it because of alleged errors on the part of the examiner in rejecting evidence with respect to the claimed ruinous effect of one of the order provisions and for lack of public interest because of the alleged abandonment by respondent of the practices complained of.

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[2]Throughout this opinion, whenever the term "respondent" is used in the singular, it refers to the corporate respondent and not respondent Melley in his individual capacity, since only the corporate respondent has appealed the examiner's decision.

We will deal with each of these contentions seriatim.

I.

The Participation of Respondent James A. Melley, Sr.

The examiner found that the respondent Standard Educators, Inc., had been organized by respondent James A. Melley, Sr., in April 1957 ((ID 3). Melley had been a salesman in the book and magazine industry since 1945 and organized Standard Educators when he decided to go into business for himself (Tr. 116-17).

Melley did all the work, including the filing of legal documents necessary to begin operations. He personally made the arrangements with the publishers, drafted the incorporation papers and mortgaged his home to raise the needed money (Tr. 117-18). Melley, his wife (Margaret) and his father were the incorporators (Tr. 119). The officers of Standard Educators in 1957 were: James A. Melley, President and Treasurer; Margaret Melley, Vice President and Secretary; and James A. Melley, Sr. (respondent's father), Assistant Secretary and Assistant Treasurer (Tr. 119; ID 3). The respondent owned 51% of the stock, his wife 46% and his father 3% (Tr. 122; ID 3).

Melley's title in the corporation and his share of stock ownership have remained unchanged to the present.[3] Melley continues as president of the corporation, although the officers and the board have been reconstituted.[4]

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[3]Stock ownership did change in 1958 with respect to the 3% owned by Melley's father. This 3% is now owned by his son, James A. Melley, Jr. In 1958, James A. Melley, Sr., respondent's father, died and his stock was passed to Melley's mother. Mrs. Melley, Sr. died in 1962, at which time the respondent's son inherited her 3% (Tr. 122).

[4]Mrs. Melley remains a director, but now serves only as Secretary. James A. Melley, Jr., now serves as Assistant Secretary and Assistant Treasurer, and Robert Atwood a former salesman for the company has been promoted to Vice President and member of the Board (Tr. 124; ID 3).

In the early years of Standard Educators' formation, Mr. Melley with the aid of two other salesmen did the selling himself. His wife did the clerical work in the office (Tr. 125). All of the expertise in putting the business together and in determining the pattern of its operations was Melley's (Tr. 117, 19-92, 458, 126; ID 4). He set the retail price structure and sales techniques for the business and determined what options would be included in the combination offer (Tr. 126, 145). He devised the contract form which was used by Standard Educators as part of the alleged misrepresentations and deceptive sales practices which the Examiner found to have taken place here (Tr. 149; CX 18).

Standard Educators' business has grown considerably since 1957. In 1957, with three salesmen, including Melley, and one clerical assistant in the office, Standard Educators grossed about $130,000 (Tr. 408). In 1969, with about 20 people in the office and some 50 salesmen, Standard Educators grossed over $2 million (Tr. 408, 420). In the past three years alone, Standard Educators has employed over 500 salesmen (Tr. 135).

Melley's role as founder and chief executive officer of the corporation over the years is best summarized in the following exchange during Melley's testimony at the hearing:

> Q. What are your duties as president of this corporation?
>
> A. My duties – I don't seem to have too many duties any more to be frank with you.
>
> Q. What were your duties? When you established this corporation, what were your duties?
>
> A. To sell and help train people, other people, mostly to stay in the business, initially.
>
> Q. What did you do to stay in business?
>
> A. I went out and wrote business myself.
>
> HEARING EXAMINER POINDEXTER: What do you do now?

A. Now I go to the office and I check with the sales manager to see how things are going; and I check with the office manager to see how things are going. I check with the collection manager to see how things are going in that department, and I check my collections each day to see how much money comes in, and I check to see how much money is being spent, and I check the quality of the business from time to time. I ask if there is [sic] any problems.

HEARING EXAMINER POINDEXTER: If there are what do you do?

A. Then I discuss it with the people involved. I never interfere in the office.

. . . .

HEARING EXAMINER POINDEXTER: Do you have a boss? Does the company Standard Educators?

A. Have a boss? Well, I mean, I am the president of the company; I am supposed to be the boss.

Q. Do you act as the boss?

A. Oh, I act as the boss when the opportunity affords itself. (Tr. 146-48).

The record is clear that Mr. Melley himself no longer engages in any selling duties (Tr. 137).[5] It is also clear that Mr. Melley is still the principal moving force behind the operations of the corporation – the only other officers actively employed being Atwood, Melley's sales manager, and Melley's son, one of Standard Educators' salesmen.

The examiner based his dismissal of Mr. Melley as an individual respondent on his conclusion that there was no evidence that Mr. Melley personally committed any illegal act in his individual capacity, that the record contained no evidence

[5]The hearing examiner summarized the role of Melley as follows:

As the business of the respondents has grown and increased, Mr. Melley no longer participates in door-to-door selling and now spends his time in the office supervising the overall operation of Standard Educators, Inc. (Melley, Tr. 146-48). (ID 5).

that Melley "formulates, directs and controls the acts and practices of corporate respondent in any capacity other than as an officer," and that no evidence was introduced to show that the corporate respondent was a sham or organized in order to evade a Federal Trade Commission order (ID 29-31). Therefore, the examiner concluded that the complaint must be dismissed as respects Mr. Melley.

We do not agree. There is no support either in fact or in law for the examiner's conclusion. The record amply supports the complaint's allegations that respondent Melley formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint, and that an order against Mr. Melley is necessary in order to achieve effective relief in this case.

The evidence shows that Melley meets all of the standards for determining individual liability in Federal Trade Commission proceedings. *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966). In *Fred Meyer*, the court of appeals sustained the Commission's decision to hold two officers of the corporate respondent liable in their individual capacities, based on the following considerations: (1) respondents owned and controlled the closely held, family corporation; (2) they set the policies and reviewed the practices of the corporation; and (3) they knew of and authorized the alleged illegal practices.

Fred Meyer involved violations of Sections 2(a) and 2(f) of the Clayton Act in connection with the use of a "coupon book promotion." The individual respondents were Fred G. Meyer, chairman of the board of directors of the corporation, and Earle A. Chiles, president. Neither party owned a majority of the corporate stock, but in combination with their immediate families, they owned almost all of the common voting stock.

The Commission concluded that under such circumstances the corporation was the "alter ego" of the individual respondents and that this justified subjecting them to the order, otherwise it could be easily circumvented. *Fred Meyer, Inc.*, 63 F.T.C. 1, 70-1 (1963). The court of appeals affirmed the Commission's conclusion and noted further, as did the Commission in its opinion, that "Meyer was originally responsible for insti-

tuting the coupon book promotion," and that "Chiles himself testified that 'we set the policies and review the practices' " of the company. 359 F.2d at 368.

A key issue in the case before the Commission was whether Meyer, in fact, knew of and authorized the unlawful promotion. In his testimony Meyer stated that:

> [H]e had been in the industry 50 years; that he had been president until 4 or 5 years ago; that his "duties are vague", that he has "no specific duties"; that he now has nothing to do with advertising or sales policies (he was active in them until about 10 years ago); that he doesn't know how many buyers the company has . . . . 63 F.T.C. at 71.

The Commission found that the respondent would not have permitted the challenged promotion to continue if he had not personally approved it. The court agreed, finding that "despite Meyer's denials of knowledge of the operations of the business, the Commission was justified in concluding that 'if a majority of Portland's 120,000 families were apprised of the details of these programs, we think it is fair inference that the Chairman of the Board also knows about them' . . . ." 359 F.2d at 368 (footnote omitted).

The facts critical to a finding of individual liability in *Fred Meyer* are also present in the instant case. Standard Educators is a closely held, family corporation. Respondent Melley owns a majority of the corporate stock, and is both the chairman of the board of directors and president of the corporation (in these respects, Melley would appear to have even greater control over the corporate entity than Meyer who owned less than a majority of the stock and was not president of the corporation). The only other majority owner of Standard Educators is Mrs. Melley, who apparently has no role in the management of the business. The other active officers are Atwood, who owns no stock, and Melley's son, who owns only 3% of the stock. Melley thus emerges as the principal figure in terms of management and control of the corporation.

Further, it is evident from the record that Melley formulates and directs the policies and practices of the corporation, although he specifically denied this allegation in his answer to the complaint.

The examiner found that Melley continues to supervise the over-all operation of Standard Educators (ID 5). Melley's own testimony reveals that he acts as "the boss," and regularly supervises the corporate business and that problems which arise are brought to him for resolution (Tr. 146-48). He personally oversees the corporation's price list and pricing structure to keep it updated (Tr. 145). Further, he is largely responsible for the preparation of the contracts used by Standard Educators (Tr. 149, 162).

Although Melley no longer trains salesmen himself, he does the hiring of sales managers who in turn hire the salesmen (Tr. 148, 195-96). In fact, Melley himself hired the sales manager responsible for the contract with complaint counsel's witness, Fred Bryant, and Melley personally accepted that contract (Tr. 149; CX 18). Mr. Melley formulates and directs the corporate policies and practices to a sufficient extent to warrant including him in the Commission's order.

Further, it is clear from the record, that Mr. Melley knew of and approved many of the challenged practices. He admitted that he personally developed the form contract used by Standard Educators' salesmen in the period covered by the litigation (Tr. 149). We find that this contract was an integral part of the deceptive sales practices challenged in the complaint, and that Melley's development of the contract, which was so closely tied to these illegal practices, makes it obvious that he was not unaware of the sales tactics of his salesmen and that he approved their use.

The contract called for the purchaser to agree to "cooperate with [Standard Educators] in [its] National Program in expressing my opinion of the New Standard Encyclopedia." (CX 18.) This contract provision gave support to the alleged misrepresentations by respondent's salesmen that Standard Educators was conducting a national advertising

campaign in which specially selected persons would obtain encyclopedias at a reduced price in return for their endorsement of the books. Further, the contract was specifically designed for sales to military personnel, with spaces provided to collect information on name, rank, serial number, and duty station. These provisions correspond to the deceptive sales pitch that the offer was a special introductory offer for a specially selected group, *i.e.*, members of the Armed Forces. In addition, the contract referred to the sale as part of the "National Combination offer," which corresponds to the alleged deceptions by salesmen that purchasers would pay less than the full price for each book when the "combination" of books was purchased. And finally, the contract provided that a charge of $3.95 would be made each year "for delivery" of an extension service and binder, which corresponds to the sales pitch that the additional cost was merely for postage and handling charges (CX 18, 20-29).

In our opinion, the contract designed by Melley strongly suggests that the salesmen were authorized to sell encyclopedias in the deceptive manner charged, since it is unlikely that such contracts could be supplied for any other purpose. In our view, therefore, the evidence amply supports the conclusion that Melley personally was aware of and approved the sales practices of his salesmen and that the examiner erred in his conclusion that there was no evidence of personal involvement by Melley. It was unnecessary to find that Melley himself engaged in the door-to-door selling misrepresentations, or that he personally trained the salesmen in these techniques. *Steelco Stainless Steel* v. *FTC*, 187 F.2d 693 (7th Cir. 1951); *Sebrone Co.* v. *FTC*, 135 F.2d 676 (7th Cir. 1943).

In dismissing the complaint against Mr. Melley, the examiner indicated that there was no evidence that the corporate respondent was a sham or organized to evade a Commission order. We do not believe such evidence is necessary to hold an individual as a party respondent. In *Fred Meyer* there was no finding that the corporation was a sham, nor has a similar finding been considered a requisite to individual liability in other cases. *See Standard Distributors, Inc.* v. *FTC*, 211 F.2d 7 (2nd Cir. 1954); *Benrus Watch Co., Inc.* v. *FTC*, 352 F.2d 313 (8th

Cir. 1965), *cert. denied,* 384 U.S. 939 (1966); *Coran Bros. Corp.*, FTC Docket No. 8697 (July 11, 1967).

The rationale for subjecting respondents in their individual capacities to Commission orders is to assure that such orders will be fully effective in preventing the unlawful activities. However, it is not necessary to find specifically that a respondent intends to violate the Commission's order in his individual capacity. In *Coran Bros. Corp.*, FTC Docket No. 8697 (July 11, 1967; slip op. at 3), the Commission stated:

> Where proof of possible or intended evasion [of an order] is demonstrated, an even stronger case is made for holding an individual personally liable. Such a factor is not, however, controlling.
>
> The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization.

The individual respondent in *Coran Bros.*, as in the instant case, was the major stockholder in a closely held, family corporation, who could easily reorganize the corporation and continue the illegal practices.

In dismissing the complaint against Mr. Melley, the examiner relied upon two cases which we do not find controlling in the instant case. The first is *Lovable Co.*, 67 F.T.C. 1326 (1965). The standard for determining the liability of individual respondents which was set forth in that case was designed to cover corporate officers. There was no indication that the officers were also the major stockholders in control of

a closely held corporation, as in the instant case. We believe the difference in the positions of the respondents in *Lovable* and in the case at hand is crucial. Unlike mere officers, controlling owners of a corporation have it within their power to evade a Commission order by reorganizing the corporation or by forming a partnership to continue the business.

The second case relied upon by the examiner was *Flotill Products, Inc.* v. *FTC*, 358 F.2d 224 (9th Cir. 1966). In this case, the individually named respondents were the corporate officers and owners of a closely held, family corporation. The Commission found them individually liable and the court of appeals reversed. The court determined that proof merely of respondents' ownership and control of the corporation did not warrant including them as individuals in the order. Additional record evidence must show, the court said, that such respondents were personally involved in the violations charged or would be likely to evade a future order. As indicated above, we have found that the record in this case does disclose more than mere ownership and control of the corporation by Mr. Melley. We have found substantial personal involvement by the respondent in authorizing and approving the illegal practices of the corporation, thereby requiring the imposition of individual liability in order to assure an effective order.

II.

Respondent's Contentions With Respect To Illegal Search And Seizure

Respondent contends that the evidence on which counsel supporting the complaint relied, first came to the Commission's attention as a result of an illegal search and seizure by a Commission investigator, and that the hearing examiner erred in refusing to grant respondent's motion to suppress both the documentary and testimonial evidence originating from the alleged illegal investigation.

Respondent's contention rests solely on the testimony of its president, respondent Melley, and its vice president and sales manager, Robert Atwood. Complaint counsel countered this testimony by placing on the witness stand the original Commission investigator, David DiNardi, whom respondent alleged engaged in the challenged improper investigatory tactics. Respondent sought to require production of various memoranda, field reports and notes which DiNardi testified he had prepared and signed reflecting his activities and summaries of his investigation (TR. 27, 29, 30, 34). The examiner – erroneously in our opinion – refused to require production of those memoranda, and respondent cites this refusal as additional grounds for error. We have no doubt that this error on the part of the examiner would require either that we strike the testimony of DiNardi or direct a remand of this case to afford respondent an opportunity to examine the documents and re-examine DiNardi on the search and seizure issue. We conclude, however, that a review of Melley's testimony on this point makes it clear that relying solely on respondent's version of the facts and disregarding entirely any of the testimony offered by DiNardi that no unreasonable search and seizure took place. Accordingly, we will strike the testimony of Dinardi in its entirety thereby rendering unnecessary and immaterial the production of his notes and memoranda for the purpose of enabling respondent to conduct an effective cross-examination of this witness. [6]

Mr. Melley testified that on the morning of April 10, 1967, Mr. DiNardi appeared at his office and identified himself as an FTC attorney-investigator (Tr. 64, 65, 77, 86, 89, 91). He informed Mr. Melley that he was investigating Standard Educators and would like to obtain some information. Mr. Melley

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[6] Respondent contends that the documents were required not only to cross-examine DiNardi but also to permit Melley to refresh his own memory. We find no basis whatsoever for respondent's contention that an investigator's work product must be turned over to the respondent to jog the memory of its own witness. *See Hickman* v. *Taylor*, 329 U.S. 495 (1947).

replied he would be happy to give him any information he wanted and then answered a number of questions about the company's business. He showed DiNardi some sales materials and two tax statements which were kept in his office (Tr. 65-66). Mr. Melley then testified:

> Up to this time I was very, very happy to cooperate with [DiNardi], I felt that was the thing to do, but then I sensed a little bit of a feeling of dispair or I felt that things were going to get a little bit rough from here on in. . . . Then [DiNardi] said, "Well, I would like to go downstairs and look through your records." I said, "Well, I don't think you should be allowed to go through my records." I said, "In fact, I think I need some advice; maybe I should get advice from an attorney or something." He says, "I am an attorney . . . and frankly if I wanted to, I could get a court order and back up a truck and take all the records that I need." (Tr. 66-67, 70-78.)

When asked if this was said in a threatening manner, Melley answered:

> I don't think he raised his voice; I think it might have been as a matter of information . . . I can't recollect his complete demeanor at the time. I remember mine, I was pretty warm at that particular instant. (Tr. 78-79.)

Mr. Melley testified that DiNardi then went on to explain that the Federal Trade Commission also helps business and that if irregularities are uncovered, a business is given an opportunity to correct them voluntarily, but if they are not corrected a cease and desist order may be issued (Tr. 67).

After DiNardi mentioned voluntary compliance, Melley suggested to DiNardi that it would probably pay to be cooperative and DiNardi agreed. Melley then told DiNardi that he could proceed with the investigation (Tr. 68).

Melley further testified that he was "shook" by DiNardi's comment that he could get a court order, but that he ultimately decided to let DiNardi go through the records because DiNardi's

statement that the Commission was "lenient" made him feel that DiNardi represented both the businessman and the FTC. He stated:

> I looked on it [sic] more as a mediator than an investigator, to be frank with you. The only reason I consented after I rebelled, sort of, was when he mentioned the fact that a voluntary compliance was a possibility. He did not promise me a voluntary compliance, but he said this was a definite possibility in cases where this is your first investigation, and the Federal Trade Commission often gives you a chance to get your house in order. (Tr. 69-70.)

DiNardi's visit on the morning of April 10, lasted about an hour, during which time Melley showed him the tax forms mentioned above and examples of contracts (Tr. 71, 77).

On the evening of April 10, Melley attempted to contact his attorney, and failing to reach him called a business friend who advised him to cooperate with the investigator (Tr. 72).

Melley then testified:

> So I weighed the thing myself and I figured, well, one way or the other they are going to get all the information they need, so it would be just as well if I went right ahead and planned my little trip out of town and so forth. (Tr. 72.)

The following day, April 11, DiNardi returned to the office and continued his investigation. Melley invited him to lunch and cooperated with the investigation (Tr. 72, 73).

Melley testified:

> At this time, I had resolved that things were going to be all right, I took a liking to him [DiNardi]. . . . I felt he had a job to do. . . . I felt that I had made a wise decision, in a sense. (Tr. 73.)

On April 12, Melley went out of town on a golfing trip, and DiNardi continued his investigation on April 12 and 13

with the cooperation of the office manager whom Melley had directed to be of assistance (Tr. 74).

DiNardi returned in the last week of May seeking additional records, and Melley instructed the Office manager to cooperate in providing him with what he wanted. Again, Melley and DiNardi had lunch together (Tr. 75-76).

Mr. Atwood then testified as to the events surrounding DiNardi's visit to Standard Educators. He stated that he had been introduced to DiNardi on April 10, and that following DiNardi's departure that morning, Mr. Melley told him DiNardi was from the Federal Trade Commission, had been asking him questions and was going to investigate the company. He testified that Melley was "emotionally shaken" on that morning (Tr. 89). On the following day, Atwood saw DiNardi in the offices of Standard Educators but had no conversation with him. The next time Atwood saw DiNardi was the last week in May when he joined Melley and DiNardi for lunch (Tr. 90).

The question posed in this case is whether, in view of this evidence, Melley voluntarily consented to DiNardi's search of the files. Respondent argues that DiNardi "coerced" Meeley into giving him access to the corporate files by a "combination of threats and promises." The threat consisted of DiNardi's statement that he could get a court order and take all the records; the promise was that if Melley cooperated, this would "perhaps result in a voluntary compliance." (Res. App. Br. at 26, 27.)

It is clear that a search and seizure may be made without a search warrant where the individual "freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied." *Channel* v. *United States*, 285 F.2d 217, 219 (9th Cir. 1960); *United States* v. *Vickers*, 387 F.2d 703 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968); *Judd* v. *United States*, 190 F.2d 649 (D.C. Cir. 1951). The burden of proving that the consent was given freely and voluntarily rests with the party claiming consent. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

We do not think that Melley's testimony as a whole warrants our finding that DiNardi's statements had a coercive effect upon him or that his consent to the search was other than voluntary. The voluntariness of a consent is a question of fact, *Maxwell* v. *Stephens*, 348 F.2d 325, 336 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965), to be decided in light of all the attendant circumstances. The criterial factors to be weighed include, "the setting in which the consent was obtained, what was said and done by the parties present, with particular emphasis on what was said and done by the individual consenting to the search, and his age, intelligence and educational background." *United States ex rel. Harris* v. *Hendricks*, 423 F.2d 1096, 1099 (3rd Cir. 1970).

We note at the outset that Melley "need not have had a positive desire that the search be conducted in order for his consent to have been voluntary and effective." *United States* v. *Thompson*, 356 F.2d 216, 220 (2nd Cir. 1965), *cert. denied*, 384 U.S. 964 (1966). The fact that he had some qualms at first about permitting DiNardi to search the files is thus not grounds for finding his consent was involuntary. Some expression of reluctance to a search is to be expected and does not necessarily signify coercion.[7]

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[7]Consider the following exchange which was not considered coercive by the court in *United States* v. *Morton Provision Company*, 294 F.Supp. 385, 389 (D. Del. 1968):

A. Mr. Cowgill [a Department of Agriculture investigator] came in, and after preliminary greetings he told me that he was there to get the records of the past six months of my books.

Q. And what did you say to that?

A. "Well, do I have to give them to you?"

Q. And what was his reply?

A. "Look, we can get the records so you might as well not fight it because we can get them."

The critical determination is whether Melley knew he was being asked rather than ordered to permit the search. *United States* v. *Vickers*, 387 F.2d 703, 707 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968).

It is clear from his testimony that Melley knew he had a choice in this matter. He sought advice from others, and in his own words "weighed" the entire matter in his mind following DiNardi's departure on April 10th. By the next day, he concluded that he had made "a wise decision." He did not merely acquiesce to DiNardi's request because he thought he had no alternative. He testified that ultimately the reason he consented to the file search was the possibility of voluntary compliance, although he unequivocally stated that a settlement through voluntary compliance had never been promised (Tr. 69-70). In short, Melley considered the alternatives and decided that his cooperation would be beneficial to his case. That Melley was capable of a voluntary and intelligent consent to the search is supported by the fact that he was a high school graduate and had been in business for himself for ten years (Tr. 115, 117).

It should be noted that at no time did DiNardi deceive or misinform Melley as to his purpose or authority. Melley was told that a cease and desist order might ultimately result from the investigation (Tr. 67). Nor did DiNardi mislead Melley into believing that the premises could be searched without a search warrant. In fact, he made clear that a "court order" would be required if any documents were to be taken without Melley's consent (Tr. 66, 67, 70, 78). DiNardi's assertion that he could get the court order did not render the search illegal since Melley thereafter decided to permit the search without requiring the court order. *Hamilton* v. *North Carolina*, 260 F. Supp. 632 (E.D. N.C. 1966), *aff'd*, 382 F.2d 296 (4th Cir. 1967); *Kershner* v. *Boles*, 212 F. Supp. 9 (N.D. W.V. 1963). It was not necessary for DiNardi to specifically advise Melley of his right to refuse the inspection without a warrant. *United States ex rel. Harris* v. *Hendricks*, 423 F.2d 1096 (3rd Cir. 1970); *Gorman* v. *United States*, 380 F.2d 158 (1st Cir. 1967).

There was never any evidence that DiNardi raised his voice or acted in a threatening manner (Tr. 78). When he spoke of using a truck to take away the records, Melley testified, in fact, that DiNardi "implied that maybe he would not do that but 'this is how far we could go'." (Tr. 70.)

Considering all of the circumstances surrounding Melley's consent to the search, we find that it was voluntarily given. Melley was never coerced or threatened, nor was he misinformed as to the nature of the search. He had an adequate opportunity and was sufficiently experienced in business matters to freely and intelligently give his consent. From his own testimony, we conclude that he did so.

The respondent cites four cases to support its contention that Melley's consent was involuntarily given (Res. App. Br. at 26). However, the decisions in these cases turn on critical factors not present in this case. In *United States* v. *Slusser*, 270 F. 818 (S.D. Ohio 1921), the defendant agreed to a search after a law enforcement officer displayed his badge and declared he was there to search the premises. The court found this was not a consent to waive constitutional rights but a "peaceful submission to officers of the law." 270 F. at 819.

The second case cited by respondent was *United States* v. *J.B. Kramer Grocery Co.*, 294 F. Supp. 65 (E.D. Ark.), *aff'd*, 418 F.2d 987 (8th Cir. 1969), in which the court found no voluntary consent had been given to an inspector who asserted he had the authority to inspect without a warrant and the person consenting to the search believed that a refusal might result in criminal prosecution. In *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), the Court found that a voluntary consent was not given when the officer conducting the search asserted that he possessed a warrant. Consent under such circumstances, the Court found, amounted to mere acquiescence to a claim of lawful authority. Finally, respondent relies upon *Pennsylvania* v. *Wright*, 411 Pa. 81, 190 A.2d 709 (1963), in which the court held a consent was involuntary when it was elicited through deceit and misrepresentations by the searching police officers. They had falsely told the woman who permitted the search that her husband had admitted committing a crime and had sent them for the evidence.

None of these cases supports respondent's contention that the circumstances in the instant case reflect a lack of voluntary consent. As noted above, there is nothing in Melley's testimony to indicate that DiNardi ever asserted he had the authority to search the premises without a warrant. In fact, the opposite is true. He indicated that a court order would be necessary to obtain the files. There was no threat of arrest or criminal prosecution. Nor did DiNardi deceive Melley about his authority or the purpose of his investigation. On the basis of Melley's own testimony we can only conclude that his consent was voluntarily given without coercion or duress, actual or implied. We find, therefore, that no unreasonable search and seizure took place in violation of respondent's Fourth Amendment rights.

III

Respondent's Allegations of Due Process Denial

Respondent also seeks reversal of the examiner's findings of liability on the claim that its due process rights to a fair trial were violated during the pre-trial stage of this proceeding.

Essentially, respondent's claims of unfairness rest on its contention that it had been deprived of an adequate opportunity to prepare its defense with respect to the testimony of 10 of the 13 consumer witnesses who testified as to the representations made to them by respondent's salesmen which were charged in the complaint as deceptive.[8] As a result,

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[8] Although complaint counsel called 14 consumer witnesses, we are concerned here with only 13 witnesses, since the examiner did not consider in his decision the testimony of one consumer witness, Mr. Broach. He had not signed a contract and there was no signed contract in respondent's files from which respondent could ascertain the facts surrounding the particular sale in order to prepare its defense in advance of trial. (ID, 9)

respondent argues that the hearing examiner erred in not striking the testimony of these witnesses.

With respect to five of these witnesses, respondent claims that their addresses had been incorrectly listed on the witness list which complaint counsel had been required by pre-trial order to furnish respondent. With respect to seven of the consumer witnesses called by complaint counsel, respondent contends it had been incorrectly denied an opportunity by the examiner to take their depositions upon written interrogatories.[9]

A. *Witnesses' Addresses*

The facts underlying respondent's contention concerning the witnesses' addresses are not substantially in dispute. By letter of March 3, 1970, respondent's counsel requested complaint counsel to supply them with a list of the witnesses they intended to call (Res. App. Br., app. A). In response, complaint counsel provided respondent on March 27, 1970, with a tentative witness list containing 49 names of possible Commission witnesses, consisting of 21 couples and 7 individuals (C.C. Ans. Br., app. 1). The list indicated the names and addresses of the witnesses and the paragraphs and subparagraphs of the complaint with which the testimony of each of the named witnesses would deal.

On May 13, 1970 complaint counsel submitted to respondent their final list of witnesses as required by the examiner's pre-trial order of April 13, 1970. This list confirmed the earlier list, but omitted two names and added the names of six new consumer witnesses, three of respondent's employees, and one Commission investigator. The list was thus expanded to 57 names, which included 24 couples and seven individuals who had purchased respondent's books. Complaint counsel again

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[9]Two of these seven consumer witnesses were also among the five witnesses whose addresses respondent claims had been inaccurately listed. Thus, there was a total of 10 witnesses for whom respondent claims it was unable to prepare its defense.

identified each witness by address and complaint paragraph to which he would testify (C.C. Ans. Br., app. II).

Respondent sought unsuccessfully to require complaint counsel to limit the number of witnesses on the list.[10]

On June 17, respondent sent a letter to complaint counsel indicating that it was encountering difficulty in locating some of the Commission's witnesses. On June 27th, complaint counsel sent respondent's counsel a revised witness list which contained all of the 57 names but with revised addresses for five of the couples and two of the individuals. Upon receiving this list, respondent moved on June 30th for the postponement of the hearing which was denied by the examiner on July 6th. The hearing commenced on July 7th.

Respondent claims that the testimony of five of the 13 Commission witnesses should be striken from the record on the ground that the addresses originally provided for these witnesses by complaint counsel on March 27, 1970, and repeated on May 13, 1970, were inaccurate. Accurate addresses for these witnesses were not provided respondent's counsel until June 27.

Respondent relies for its contentions of due process violations primarily on the recent decision of the Fifth Circuit

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[10]Respondent wrote complaint counsel a letter on May 20, 1970, urging him to reduce the witness list and after counsel refused, filed a motion on May 27th with the examiner seeking the same relief. Respondent urged that the number of witnesses should be limited in order to reduce its burden of preparing for cross-examinations and also to eliminate unnecessary duplication of testimony since it was clear that many of the witnesses would be called to testify about the same paragraphs and subparagraphs of the complaint. Complaint counsel pointed out that under the Commission's Rules of Practice, §3.21(d), he would be precluded by the examiner's pre-hearing order from calling any witness who had not previously been identified as such and, thus, it would be prejudicial to his case to make such a reduction.

The examiner denied the motion on May 28, 1970.

in *Pacific Molasses Co.* v. *FTC*, 356 F.2d 386 (5th Cir. 1966). We agree that this decision establishes the applicable law on the issue, but we disagree that the facts in this case in any way raise the same issues of due process which the Fifth Circuit found to exist in the *Pacific Molasses* case.

In *Pacific Molasses* the Commission brought suit in 1962 for alleged violations of Section 2(a) of the Clayton Act in the sale of "blackstrap" molasses for the first nine months of 1955. The Commission issued its complaint in April 1959, and in the fall of 1959 counsel representing both sides requested a pre-hearing conference.

On July 14, 1960, the conference was held, at which time the examiner entered an order requiring complaint counsel to present to respondents' counsel a list of the witnesses and documentary evidence to be relied upon at the hearing. The examiner did not set a day certain for this material to be provided but rather ordered that it be provided fifteen days before the date fixed for the hearing. On May 2, 1962, the examiner notified the parties that the settlement negotiations which had consumed two years must be terminated and directed that the hearing start on May 28th.

Complaint counsel's witness and document list was due under the terms of the examiner's order on May 15th. Counsel failed to provide any witnesses' names on this date. A subpoena for one witness was issued on May 18th. The names of four more witnesses were communicated to respondents on May 24th, and the identity of the remaining three witnesses was not furnished respondents until Monday, May 28th, the first day of the hearing.

Respondents' motion for a continuance was denied by the examiner on the ground that all of the witnesses were customers and employees of the respondents and the issues in the case were simple and straightforward. Respondents did proceed to cross-examine complaint counsel's witnesses and after the case-in-chief was concluded they were granted a 40-day continuance with the right to recall witnesses. The Commission found no prejudice in these actions although it viewed counsel's

failure to comply with the original pre-trial order as "regrettable." The circuit court reversed.

The court based its reversal squarely on the fact that Commission counsel had violated the examiner's pre-trial order which according to the Commission's Rule of Practice must control the proceedings (16 C.F.R. § 3.10 (1960)). The court rejected the Commission's reasoning that any surprise was overcome by the 40-day continuance since respondent's right to effective cross-examination was not satisfied by the subsequent continuance and right to recall. As the court put it:

> Effective cross-examination requires thorough preparation by counsel before trial. . . . To phrase the proper question on cross-examination requires a sound knowledge of the witness, his business, records, books and activities. And although petitioners might have gone ahead and guessed at who the witnesses might be when no word was received, this would hardly seem adequate. 356 F.2d at 390.

In the instant case, respondent's counsel did not even attempt cross-examination of the five witnesses for which he claimed he had not received timely notice of accurate addresses.

For each of the witnesses called to which the respondent raised this objection, the examiner did two things: (1) he directed a *voir dire* examination to determine the reason for complaint counsel's failure to list accurate addresses for these witnesses, whether by inadvertence, carelessness or impossibility, and (2) after ruling on the admissibility of the witness' testimony, he permitted respondent's counsel the opportunity to interview the witness privately in a separate room before commencing cross-examination. Respondent not only declined to so interview the witnesses but also declined to cross-examine.

The testimony elicited at the hearing revealed that so far as the Commission's witnesses were concerned, the failure to supply the correct addresses on May 13, was for the most part unavoidable and the May 13 addresses were, in fact, the best available.

To wit:

1. Witness Linda J. Olson:
   A Colorado address was given for Mrs. Olson on May 13. At the time of the hearing, Mrs. Olson resided in Alaska. The Colorado address was the address of record received from the Department of Defense in preparation of the March 27 tentative witness list (Tr. 217-19; ID 10-11).[11]

2. Witness April Maillet:
   The May 13 witness list contained a Portsmouth, New Hampshire, address; however, at the time of trial, Mrs. Maillet was living in North Carolina. The witness testified that she had moved at the *end of April* when her husband was unexpectedly returned from Viet Nam 30 days ahead of schedule and transferred to Camp LeJeune (Tr. 292-94; ID 16-17).

3. Witness Bruce David Campbell:
   Mr. Campbell testified that he moved unexpectedly on April 6, 1970, from the Yorktown, Virginia, address on the witness list to his present address in Warren, Michigan. He received an early release from the Navy although his discharge and release had been scheduled for July. He had informed complaint counsel he would be in Virginia until July (Tr. 283-86; ID 15).

4. Witness Larry Edward Riggs:
   While both addresses on the list and at the time of trial are in Shreveport, Louisiana, the street addresses differ. The witness testified he moved in May (Tr. 302; ID 18).

5. Witness Robert E. H. Ferguson:
   Mr. Ferguson was discharged from the service on April 28, prior to which time he was stationed in Japan. Although he had corresponded with complaint counsel, he never sent a forwarding address (Tr. 344-47; ID 23). He returned stateside in June.

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[11] In all cases, the addresses on the March 27, and May 13, lists are identical unless otherwise indicated.

Thus, the issue is squarely presented as to whether complaint counsel's failure to supply accurate addresses for each of the witnesses constitutes a "violation" of the examiner's order within the meaning of the court's decision in *Pacific Molasses*. This precise question is one of first impression. Nevertheless, the issue is essentially one of fairness and reasonableness. Under the facts as they are presented in this case, we are of the view that no such flat refusal to comply with the pre-trial order governing this proceeding took place here as it did in *Pacific Molasses*. In the instant case, complaint counsel complied with the hearing examiner's order by providing both the names of the witnesses he intended to call as well as the addresses of those witnesses as he knew them. The record indicates that as soon as he learned that the addresses were inaccurate, he so notified respondent.

All of these five witnesses were customers of respondent who had executed contracts with respondent for the purchase of respondent's books. Communication of their names to respondent as required by the order provided respondent with full opportunity to prepare itself with respect to the possible testimony of these witnesses. By learning their names, respondent was able to turn to its own files to determine the nature and circumstances of their purchases, the salesmen involved and any other information pertinent to the particular complaint allegations as to which these witnesses would be testifying.

Certainly respondent's trial preparation would have been considerably eased if complaint counsel had been able or willing to pare his witness list down to more manageable proportions earlier than June 27, only ten days before hearing with an intervening holiday weekend. Nevertheless, complaint counsel was obviously laboring under considerable difficulty himself in view of the nature of the witnesses who must inevitably be called. In one sense, the problem was created by respondent because of its business policy of directing sales to military personnel. Indeed, recognizing the difficulty to itself caused by this policy, respondent's contracts provided space to secure data not only on the name, rank, serial number, present duty post and present address, but they also provided space for the home address of the purchaser and the name and address of a relative not living

with the purchaser (CX 18 A-B). It seems clear that respondent had at least an equal opportunity, and perhaps a better one than complaint counsel, to locate the present whereabouts of these witnesses.

Moreover, during the proceeding, the examiner did everything in his power to assure that respondent had full opportunity to prepare for cross-examination. After having ascertained that the inaccurate address had in no way been the result of complaint counsel's carelessness or deliberate efforts to make access to their witnesses difficult for respondent, the examiner gave respondent the opportunity to interview these witnesses prior to cross-examination. Respondent's counsel refused to avail themselves of this opportunity and persisted in their refusal to avail themselves of their right to cross-examine as well.

We hold that the examiner did not err in refusing to strike the testimony of these witnesses. We do not believe that the inaccuracy of the addresses in this case constitutes a violation of the examiner's pre-trial order such as to compel reversal of this case under *Pacific Molasses*. Nor do we believe that any prejudice, in fact, resulted to respondent under the procedures offered and made available to respondent once the final identify of the witnesses, together with their correct addresses, was made known to respondent.

B. *Witness Depositions*

After respondent's motion to reduce the number of witnesses on the May 13th witness list was denied by the examiner on May 28th,[12] respondent on June 9, 1970, filed a motion to take depositions upon written interrogatories of 14 of the witnesses listed on complaint counsel's May 13th list.

In support of its motion, respondent argued that it would be impossible to interview all of complaint counsel's witnesses in advance of trial, that it did not have the resources to pay for plane fares or lawyer's fees necessary to locate distant witnesses,

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[12] *See* note 10 *supra*.

and that it was necessary, therefore, to take depositions upon written interrogatories of 14 witnesses so distant that it would be impossible to interview them. The 14 witnesses were located in 12 different states outside the state of respondent's place of business.[13]

Complaint counsel opposed respondent's application on the grounds, *inter alia* (1) that respondent's assertion that interviewing the witnesses would be too costly was not a justifiable ground for permitting the depositions; (2) that respondent had not made any showing that it had made any efforts to obtain the desired information voluntarily as required by Commission Rules; (3) that respondent had made no showing of having attempted to contact the witnesses by phone or letter; and finally (4) that much of the information to be sought from the witnesses was already in the possession of respondent (C.C. Ans. to Resp. Application for Depositions upon Written Interrogatories, June 25, 1970).

On June 27, 1970, the hearing examiner denied respondent's application for depositions upon written interrogatories on the grounds that the information sought could be obtained at the hearing, that the information sought was not "vital" to respondent, and that much of the information sought through the interrogatories was already in respondent's possession.[14]

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[13]Respondent was located in Connecticut; the witnesses lived in Illinois, Oklahoma, California, Michigan, Minnesota, Kentucky, Ohio, Alaska, Louisiana, New York, South Carolina and Arkansas.

[14]Respondent's written interrogatories contained 28 questions which were aimed at obtaining *inter alia* the following information: the name of the Standard Educators' salesman who met with and sold books to the witness, the length of his visit and the substance of his conversation with the witness; whether the witness paid in full for his books and whether a Standard Educators' representative had called the witness to confirm that he had signed the contract; and whether the witness thereafter had been interviewed by a representative of the Federal Trade Commission, was shown any documents by that representative or signed any statement on his request.

As noted earlier, the case proceeded as scheduled on July 9, 1970. Seven of the 14 witnesses whom respondnet sought to depose were called to testify, and again respondent's counsel declined to cross-examine them. Respondent now contends that the examiner erred in failing to strike the testimony of these seven witnesses on the grounds that respondent had not been permitted to take the depositions of these witnesses in advance of the hearing.

The Commission's Rules of Practice are very clear on the rights of respondents to take depositions in advance of trial. Section 3.33(a) of these Rules provides that the examiner may order the taking of depositions "upon a showing that the deposition is necessary for purposes of discovery and that such discovery could not be accomplished by voluntary methods."

Respondent made now showing of any kind as to why the discovery which it sought could not have been accomplished by voluntary methods, beyond its assertion that voluntary methods were unavailable because the witnesses were "scattered throughout the country," and that it did not wish to travel to the witnesses and interview them in person. Yet the need to interview these witnesses in person was not apparently the crux of respondent's trial preparation needs. In its motion respondent was seeking only written interrogatories. Thus, the ruling which respondent is now claiming violated its due process rights did not involve a denial of personal confrontation. Obviously, respondent did not believe it necessary to observe the demeanor of these witnesses or probe in personal question and answer form, the extent of their memories. Therefore, its claim of due process violation here rests solely on the alleged denial to it of an opportunity to obtain the desired information by compulsory process.

Respondent clearly could have telephoned or written these witnesses to at least explore their willingness to talk to respondent and to provide the information desired. With one exception, correct addresses for the seven witnesses called to

testify were given to respondent well in advance of trial.[15] There is nothing in the record to indicate that respondent could not have ascertained what it needed or wanted to know from these witnesses by informal, voluntary means. The information sought through the interrogatories[16] involved such questions as the name of the salesman who contacted the witness, whether the witness had paid for the books in full, and whether a Standard Educators' representative had called the witness to confirm the sale. Much of it was in respondent's files.[17] Even if some of the information in respondent's files was inaccurate, respondent could have verified this information by a simple telephone call. Similarly, it would not have seemed impossible to have at least tried to ascertain by letter or telephone the other information in which respondent was interested concerning the substance of the salesman's conversation with the witness and whether the Commission had contacted the witness.

There was no evidence that such informal contacts to ascertain this limited and specific information would have proven fruitless.

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[15]Mrs. Olson's address was incorrectly listed until June 27th so that respondent would have had some difficulty in reaching her by letter or telephone. Correct addresses were provided as early as March 27, 1970 for four of the witnesses respondent sought to depose, and the May 13th list provided correct addresses for the other two witnesses. Although respondent also objected to Mr. Riggs' testimony on the grounds that an incorrect address had been given for him, it was apparent from Mr. Riggs' testimony, noted earlier, that he did not move until May. Respondent had been given his correct address on the March 27th list and, thus, had sufficient time to reach him at the address supplied by complaint counsel.

[16]*See* note 14, *supra.*

[17]Samples of respondent's contracts entered into evidence during the trial did, in fact, contain the signature of the sales representative (CX 18, 20-29).

As we pointed out in *Associated Merchandising Corp.*, FTC Docket No. 8651 (November 13, 1967), the mere fact that witnesses are to be called by complaint counsel is not a sufficient basis for assuming that they will not cooperate voluntarily in providing information to the respondent. Clearly respondent could have at least made a minimal and preliminary effort to secure the desired information by letter or telephone.

Yet respondent did none of these things. Rather it simply asserted to the examiner that it desired the deposition because it did not wish to expend the monies which would be required to travel to the witnesses' place of residence and interview them in person.

There is no doubt that cross-examination is an important, perhaps vital, facet of the adversary process. Certainly interviewing witnesses to learn what it is they know about the issues to which they will be testifying is important in preparing one's defense. But none of these factors is in issue in this case. Instead, respondent, because it failed to make even a minimal showing of compliance with the Commission's Rules is in effect, presenting this Commission with a bare claim that it has an absolute right to compulsory process in order to interrogate prospective witnesses by means of written interrogatories.

The Commission's Rules of Practice are premised on the position that compulsory process is available and may indeed be necessary. However, Rule 3.33(a) requires that some showing be made that compulsory process is necessary. It is arguable that requiring such a showing is either unnecessary or unwise or both. But the issue before the Commission is not the wisdom of this rule. Respondent made no effort to comply with the Commission's Rules, despite the fact that the circumstances surrounding respondent's discovery request indicate that respondent might have easily obtained the limited and specific information it was seeking through interrogatories by the very simple means of writing or telephoning the witnesses. Or at least, it could have been in a position to advise the examiner that it was unable to seek the information voluntarily as required by the Rule. Had the witnesses been cooperative, these voluntary methods of discovery would have yielded the same

information which respondent could have expected from the use of written interrogatories. Had they not been cooperative or were in some other way rendering this method of trial preparation inadequate, respondent had only to present the problem to the hearing examiner. But this is not what respondent did. Instead, it simply ignored the Commission's Rule and sought instead to insist on discovery through written interrogatories without making any showing of any kind that the Rule's standard was or should be regarded as inapplicable to it.

We find neither theoretical nor actual prejudice to respondent's rights as a result of the examiner's ruling. In view of respondent's failure to show that its requested discovery was unavailable through voluntary methods, as required by Section 3.33(a), and upon our own independent determination that we find no actual prejudice to respondent's rights, we conclude that the hearing examiner acted reasonably in denying respondent's request for Commission process to obtain discovery.

In reaching this conclusion, we do not depart from our holding in *Koppers Co., Inc.*, FTC Docket No. 8755 (July 2, 1968). *Koppers* in no way modified the requirement of Section 3.33(a) that discovery be attempted voluntarily before Commission process is granted. In that case, respondent explicitly set forth the steps it took to secure discovery by informal means. Respondent had by letter, sought interviews with the witnesses, and only after counsel for these witnesses rejected the request and advised respondent to seek discovery under the Commission's rules did respondent apply to the hearing examiner for Commission process (Resp. Interlocutory App. Br. at 5). Thus, it was evident that the respondent had fully satisfied that portion of Section 3.33(a) requiring that voluntary methods for obtaining discovery be attempted.

Respondent relies on *Koppers* to argue that its requested depositions were necessary to prepare for effective cross-examination at trial. However, in the instant case we need not reach the issue of whether the information sought by respondent through the use of interrogatories was "necessary" for purposes of discovery within the meaning of Section

3.33(a).[18] Whether or not this information was necessary in the absence of respondent's showing that the information could not have been obtained voluntarily, its application for depositions should have been denied. We, therefore, find no grounds for reversing the hearing examiner's ruling on respondent's application for depositions upon written interrogatories.

Taking all of the circumstances of this case into consideration, we believe it essential that we come to grips with the question of whether the handicaps under which respondent claims it labored in trying to prepare its case, in fact, constituted such irreparable harm and prejudice that the public interest – quite apart from the requirements of due process – compel either a remand, or as respondent urges, a dismissal of this case.

The examiner's findings that the challenged representations were in fact made as alleged in the complaint rested on the essentially identical testimony of 13 consumer witnesses. The testimony of three of these witnesses is not now challenged in any way by respondent. Respondent's contentions with respect to the prejudicial effect of the incorrect addresses affect only five of these witnesses. Its contentions with respect to the denial of its request to depose witnesses affect only seven of these witnesses, two of whom also fall in the group of five witnesses with allegedly incorrect addresses. Thus, it is important to note that even if the Commission determined to strike the testimony of all of the consumer witnesses to whom respondent is objecting, or only those involved in the examiner's refusal to permit depositions, there would still be both consumer testimony and documentary evidence in this record supporting the complaint allegations as to the types of representations which respondent's salesmen made in the course of their sales pitch. It is also important to note that the testimony of these witnesses constituted only one portion of the total evidence offered to prove the allegations in this complaint that

[18]The hearing examiner based his denial of respondent's application for depositions on the grounds that the discovery was not necessary. Having so concluded, he denied the application without considering whether the discovery could have been obtained by voluntary means.

respondent engaged in unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act. The testimony of the consumer witnesses was offered to prove that the allegedly false representations had, in fact, been made by respondent's salesmen. Their testimony and the making of these representations was corroborated by documentary evidence offered by complaint counsel, consisting of the sales contracts themselves which respondent's customers executed (CX 18, 20-29). Finally, evidence of the falsity of these representations did not depend in any sense on the testimony of these consumer witnesses. It rested entirely on testimony of respondent's own employees and on documents contained in respondent's files (Tr. 145, 156-8, 175-A, CX 3, 35).

But we do not rest our conclusion about the outcome of this case on this basis. We must also examine carefully the issues in this case on which these customer witnesses were called to testify.

The issues in this case were relatively simple. They involved essentially the sales methods by which respondent was alleged to have conducted its business. Obviously, respondent was fully cognizant of the facts surrounding the conduct of its own business. Moreover, respondent had in its own files the basic information surrounding the sales transactions to which these consumer witnesses would testify — the dates of the contracts, the names of the salesmen who made the sales, the types of materials purchased and the terms of the transactions.[19] Thus, we are not dealing here with facts in issue which are wholly unknown to respondent and do not relate to its business.

It is also clear that respondent was confronted by complaint counsel with a relatively long list of consumer witnesses, 24 couples and seven individuals. Understandably, it wanted to contact the witnesses before trial in order to prepare its case. Respondent was reluctant, for its own reasons, to expend the money involved in personally interviewing these 24 couples and seven individuals. Again it can hardly be disputed that it could have been quite costly for respondent or its counsel to travel

[19] *See* notes 8 and 17, *supra*.

from Connecticut, respondents's place of business, to Alaska, Louisiana or California, to mention only the most distant states in which some of the witnesses lived.

Balanced against these problems of trial preparation is the fact that respondent was engaged in a national sales operation. Thus, the selection of witnesses and the distances at which they lived was solely the result of the nature of respondent's business. While trial preparation is inevitably a costly process, the ultimate decision as to how to trade off the needs of trial preparation and the costs involved is essentially a personal decision of the respondent. Again it is respondent's own business conduct which sets these proceedings in motion, and the personal costs involved must be considered against the potential injury to the public which flowed from respondent's activities, if in fact the complaint allegations are finally supported. Moreover, respondent's counsel was not rendered completely helpless in their preparation for trial by the financial constraints which they imposed on themselves and by the obstacles which they encountered in trying to interrogate these witnesses by written interrogatories. The hearing examiner made every effort to provide counsel with the opportunity to interview these witnesses while the trial was proceeding. It was respondent's counsel who elected to stand on what they regarded as their legal rights. They, therefore, consciously assumed the risk which could flow to their client of entering no defense to these witnesses' testimony. This was a risk which they were entitled to take but it is also relevant to our consideration of whether they had any options to avoid the irreparable harm they claim arose from the obstacles purportedly placed in their way by the examiner's ruling. It is clear that the obstacles, such as they were, could have been ameliorated by respondent's counsel. They elected not to do so. This was surely their right. But our responsibility is a broader one. The Commission is charged with the responsibility of ensuring that the public is protected against unfair acts and practices.

In this case the unfair and deceptive practices charged in the complaint involved respondent's methods of selling encyclopedias to members of the armed forces. At the trial, the hearing examiner weighed the evidence, observed the demeanor

of the witnesses and concluded that the complaint allegations had been proven. Respondent participated fully in the trial, cross-examining those witnesses whom it chose to cross-examine and offering its own defense and witnesses. Three of the 13 consumer witnesses called by complaint counsel to testify as to the representations of respondent's salesmen were fully cross-examined by respondent. The other 10 consumer witnesses respondent by its own volition elected not to cross-examine. It is significant here that the examiner's refusal to allow the depositions on written interrogatories affected only seven of the consumer witnesses called. As to the remaining three witnesses, respondent's basis for not cross-examining them rested not on its inability to interrogate or interview them but simply on the fact that their addresses had been incorrectly listed.

This case was first investigated in April, 1967. Complaint was filed in January, 1970. Weighing the right and interest of the public in the protection of the law against the handicaps which respondent claims it encountered as a result of the conduct of this proceeding, we do not believe that respondent's rights to prepare its defense and present its evidence were so irreparably crippled by the recited events as to require us to remand this case with all of the attendant delay and fading of memories inevitably involved.

Accordingly, we deny respondent's claims of unfairness and due process violations in the proceedings of this case.

IV.

The Scope and Necessity for an Order

Respondent contends that no order should be entered here because the practices found to have violated the law have now been abandoned by respondent (Res. App. Br. 33). The examiner made no specific findings of fact on the issue of abandonment. Rather, he concluded that the proceedings were in the public interest and that an order was necessary (ID 29).[20]

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[20]Respondent offered evidence at the hearing on the various steps taken by it to revise its practices and contracts in order to eliminate the deceptions involved in the case. (Tr. 380-84, 427-28, 430).

Whether or not abandonment is a defense sufficient to mandate dismissal of a complaint depends entirely on the timing and the circumstances surrounding the abandonment. *Eugene Dietzgen* v. *FTC*, 142 F.2d 321, 330 (7th Cir. 1944). It has long been the rule that mere discontinuance of the practice by itself is not enough to warrant automatic dismissal. *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938). The standards the courts have established look to a spontaneous and voluntary cessation of some duration prior to the complaint.

An examination of the facts in this case show cessation of questionable business practices only under the pressure of law enforcement proceedings.

The Commission began its investigation into the practices of Standard Educators in the spring of 1967 (Tr. 10). The evidence presented at the trial dealt with alleged sales techniques and contract forms in use up until at least May, 1968 (Res. App. Br. 37). It is respondent's own admission that no attempt was made to revise the offending contract forms until after the Commission had begun its investigation in 1967, and that, in fact, changes were not implemented until late 1968 and early 1969 (Res. App. Br. 37).

Respondent's business is one of a long-standing and continuing nature. There is no evidence in the record that respondent intends to change its manner of doing business in the future, i.e., via door-to-door sales of encyclopedias. Therefore, unlike many of the cases cited by respondent in its brief, its behavior in the complained of instance is not an unusual circumstance unlikely to reoccur. Nor is there any evidence of a new management as in some of the cases relied upon by respondent which would disassociate the corporation from past practices. The record is, however, replete with evidence that respondent's method of business was only discontinued upon pressure from law enforcement officers. This is clearly not "abandonment" sufficient to obviate the necessity for a Commission order.

We agree with the examiner's conclusion that an order must be entered here in order to insure that the public interest will be adequately protected against a resumption of these

practices.

Finally, respondent objects to one provision in the order entered by the hearing examiner requiring a three-day "cooling-off" period for all of respondent's contracts. Under the examiner's proposed order, the prospective customer is to be advised of his unqualified right to cancel and, in addition, is to be provided with a separate cancellation form (ID 34).[21]

Respondent contends that the record in this case "and subsequent developments at the Commission" demonstrate that there is no need for such a separate cancellation form (Res. App. Br. 38). The "subsequent developments" referred to are the announcement by the Commission of public hearings to be held to determine the necessity for a trade regulation rule which would require a three-day cooling-off period for all contracts entered into as a result of ddor-to-door sales. Respondent argues that the order provision to which it is objecting should not be imposed upon the respondent alone, while the rest of the industry waits for the results, if any, of the hearings on the trade regulation rule (Res. App. Br. 41).

In our view, respondent's argument is without merit. Respondent would have the Commission, in effect, place a moratorium on its use of the three-day cooling-off period as a remedy in adjudicative proceedings. However, the proposed rule-making cannot be construed as a limitation on the Commission's ability to order effective relief in individual cases. As the Commission pointed out in *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964):

> In the interim between the institution of a Trade Regulation Rule proceeding and the actual promulgation of any Trade Regulation Rules, the Commission, if it is to enforce the statutes within its jurisdiction, may be obliged to rely on the case-by-case adjudicative method. Commencement of a rule-making

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[21] The order provision requires respondent:

> [T]o provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

proceeding is not tantamount to declaring a moratorium on all enforcement activities with respect to transactions consummated before the effective date of the rules.

The deceptive practices found to exist in the instant case clearly call for the imposition of a three-day cooling-off period, and we believe the proposed rule-making in this area in no way impairs the Commission's authority to order such a remedy to assure the cessation of these practices.

December 6, 1971